EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 10398

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

GORDON T. CAREY, STACEY D. GEORGE, BETTY GEORGE, WILLIAM J. GEORGE, EDNA GEORGE, ANNA GEORGE CAREY, HARRY CAREY, ELIZA A. SHOEMAKER and E. P. SHOEMAKER,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 590 Folsom St., San Francisco 60—7-28-43

No. 10398

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

CARL C. DONAUGH,
United States Attorney;

J. MASON DILLARD,
Assistant United States Attorney;
U. S. Court House, Portland, Oregon,
for Appellant

JOHN W. McCULLOCH and
EDWIN D. HICKS,
Yeon building, Portland, Oregon,
for Appellees

In the District Court of the United States for the District of Oregon
March Term, 1935.

Be It Remembered, That on the 14th day of June, 1935, there was duly filed in the District Court of the United States for the District of Oregon, a Petition for Condemnation, in words and figures as follows, to wit: [1*]

And Afterwards, to wit, on the 14th day of June, 1935, there was duly Filed in said Court, a Declaration of Taking, in words and figures as follows, to wit:

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*Page numbering appearing at foot of page of original certified Trancript of Record.

In the District Court of the United States
For the District of Oregon
No. L-12492

UNITED STATES OF AMERICA,
Petitioner,

vs.

3474.34 ACRES, MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON; HARNEY COUNTY, ET AL.
Defendants.

PETITION FOR CONDEMNATION

To the Honorable, the Judges of the United States District Court for the District of Oregon:

The Petition of the United States of America, by Carl C. Donaugh, United States Attorney for the District of Oregon, and Hugh L. Biggs, Assistant United States Attorney, acting under instructions of the Attorney General and at the request of the Secretary of Agriculture, respectfully shows as follows:

1. This petition is filed under the authority and provisions of the Act for the Relief of Unemployment Through the Performance of Useful Public Works, approved March 31, 1933, (48 Stat. 22) and pursuant to Executive Order No. 6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work. [2]

2. The Secretary of Agriculture has selected for acquisition by the United States the land herein-

after described for use in the construction of useful public works and improvements in connection with the Lake Malheur Migatory Waterfowl Refuge, and for such other uses as may be authorized by Congress or by Executive Order. The said lands are necessary and are required for immediate use, in order that said construction work may be begun. In the opinion of the Secretary of Agriculture it is necessary, advantageous and in the interests of the United States that said lands be acquired by judicial proceeding as authorized by Act of Congress approved August 1, 1888 (25 Stat. 357; 40 USCA 257, 258).

3. The lands sought to be acquired in this proceeding are described as follows:

Lake Malheur Reservation Extension Tracts
3474.34 acres, more or less, in
Harney County, Oregon

The Harney County Tract (No. 4)—Lots 1, 4 and 5, Sec. 8 and Lot 2, Sec. 9, T. 27 S., R. 30 E.-W.M., containing 123.47 acres, more or less valued at $493.88.

The Harney County Tract (No. 4a)—Lot 7, NW-¼ SW¼ and NW¼, Sec. 28; Lot 3 and SE¼ SE¼, Sec. 29; Lots 2, 3, 4 and N½ NW¼, NW¼ NE¼, and SE¼ NW¼, Sec. 32; T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 550.-15 acres, more or less, valued at $2200.60.

The Harney County Tract (No. 4b)—E½ of NE¼ NE¼, E½ Lot 5, Sec. 19, T. 25 S., R. 33 E.W.M., containing 33.75 acres more or less, valued at $135.00.

The Harney County Tract (No. 4c)—SW¼ SW¼, Sec. 27, T. 25 S., R. 33 E.W.M., containing 40.00 acres, more or less, valued at $160.00.

The Harney County Tract (No. 4d)—Lot 13, Sec. 34, T. 25 S., A. 33 E.W.M., containing 35.10 acres, more or less, valued at $140.00.

The Harney County Tract (No. 4e)—Lots 1, 3 and 4 and S½ NE¼, N½ SW¼ and NW¼ SE¼, Sec. 16, T. 26 S., R. 33 E.W.M., containing 312.48 acres, more or less, valued at $1249.92.

The Lavina Griffin Tract (No. 6)—Lots 1 and 2 (more particularly described as the SE¼ NE¼), and Lots 3, 4, 5 and 6, Sec. 28, T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 129.17 acres, more or less, valued at $1130.24.

The Gerald Griffin Tract (No. 7,a)—Lots 1, 2 and 6, Sec. 13, and all that tract or parcel of land lying East of the middle subdivision line of Sec. 13 of Lot 5, Sec. 13, T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 69.33 acres, more or less, valued at $606.64.

The Leona Creason and A. Creason Tract (No. 10)—Lots 3 and 4, and all of Lot 5 west of north and south center line of Sec. 13, about 34.14 acres; and S½ NW¼, Sec. 13; Lots 7 and 8 and SE¼ NE¼ and NE¼ SE¼, Sec. 14; Lot 1, and NW¼ NE¼, Sec. 23, and Lots 1 and 2, Sec. 24, T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 437.06 acres, more or less, valued at $4479.87.

The Leona Creason and A. Creason Tract (No. 10a)—Lots 1, 2, 3, 4, 7, 8, 9 and 10, Sec. 25, T. 26 S., R. 30 E.W.M. (South of Malheur Lake); Lots

4, 5, 11, 12, 13 and 14, Sec. 30, T. 26 S., R. 31 E.W.M. (South of Malheur Lake), containing 242.-05 acres, more or less, valued at $2481.01.

The John Creasman Tract (No. 12)—Lots 3, 6, 7, Sec. 18, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 80.38 acres, more or less, valued at $964.56.

The Horace M. Horton Tract (No. 14,a,b)—Lot 11, Sec. 4; Lot 6, Sec. 8; Lot 1, Sec. 10, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 44.57 acres, more or less, valued at $445.70. [4]

The Mary A. George Tract (No. 16)—Lots 1, 2 and 3, Sec. 1; Lots 1, 2, 6, 7, 8, and 9, Sec. 2, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 177.38 acres, more or less, valued at $2128.56.

The H. L. Bechtel Tract (No. 26)—Lots 5, 7 and 8, Sec. 23; Lots 1 and 2, Sec. 26, T. 25 S., R. 32½ E.W.M., containing 161.24 acres, more or less, valued at $1773.64.

The James Thompson and Gordon T. Cary Tract (No. 31,a)—Lots 8 and 10 and W½ of Lot 5, Sec. 19, T. 25 S., R. 33 E.W.M., containing 46.67 acres, more or less, valued at $326.69.

The Maggie C. Catterson Tract (No. 33)—Lots 9, 10, 11 and 12, Sec. 20; Lots 1, 2, 3, 4, 5 and 6, Sec. 29, T. 25 S., R. 33 E.W.M., containing 176.73 acres, more or less, valued at $1413.84.

The Thomas T. Dunn Tract (No. 39,a)—Lot 4, Sec. 28; Lots 3 and 4, Sec. 32; Lots 9, 10 and 12, Sec. 33, T. 26 S., R. 32 E.W.M., (South of Malheur

Lake), containing 147.47 acres, more or less, valued at $1511.57.

The W. J. Clarke (known as Joe Kado Place) Tract (No. 41)—Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12; S½ SW¼; W½ NW¼; SE¼ NW¼; NE¼ SE¼ Sec. 36, T. 26 S., R. 31 E.W.M., (South of Malheur Lake), containing 506.46 acres, more or less, valued at $9003.34.

The Albert Hembree Tract (No. 49)—Lots 5, 6 and 11, Sec. 25; Lots 1, 3, 4 and 5, Sec. 26, T. 26 S., R. 30 E.W.M. (South of Malheur Lake), containing 139.28 acres, more or less, valued at $1392.80.

The Laura A. Dickenson Tract (No. 50)—Lot 4, Sec. 34, T. 26 S., R. 30 E.W.M. (South of Malheur Lake), containing 21.60 acres, more or less, valued at $189.00.

And together therewith all right, title claim and interest of the owners of said tracts to lands lying within the Neal survey lines purporting to surround Malheur and Mud Lakes, and the Narrows.

4. The estate taken in the said lands is the full fee simple title thereto subject only to existing public highways and public utility easements. [5]

5. As to the Harney County Tract (No. 4a), the Commissioners of Harney County executed an agreement to convey the said lands to the United States at $4.00 per acre on October 8, 1934. This agreement was entered into by the Secretary of Agriculture on December 26, 1934. The Government's abstract covering this tract was submitted to the Attorney General, and the title offered was not approved. It appears from said abstract that

the following named parties may have some right, title, claim, or interest, and they are made defendants: Harney County, Oregon; C. A. Haines, Lyman F. Smith; Lyman Franklin Smith; State Land Board; The First National Bank of Burns; Alexander McKenzie Heirs; Selenia Elliott; the Heirs of Henderson Elliott; R. L. Hutton; Cortes Elliott, Administrator; Leona Hutton; Earle C. Miller, Trustee; Oregon Oil Company; and John Anderson.

As to the Harney County Tracts (Nos. 4b, c, d), the Commissioners of Harney County executed an agreement to convey the said lands to the United States at $4.00 per acre on October 8, 1934. This agreement was entered into by the Secretary of Agriculture on December 26, 1934. The Government's abstract covering these tracts was submitted to the Attorney General, and the title offered was not approved. It appears from said abstract that the following named parties may have some right, title, claim or interest, and they are made defendants: Harney County, Oregon; Ora S. Hayes; O. Scott Hayes; Othniel E. Hayes; Izora M. Hayes; First National Bank of Burns; and the Federal Farm Loan Association.

As to the Harney County Tract (No. 4e), the Commissioners of Harney County executed an agreement to convey the said lands to the United States at $4.00 per acre on October 8, 1934. This agreement [6] was entered into by the Secretary of Agriculture on December 26, 1934. The Government's abstract covering this tract was sub-

mitted to the Attorney General, and the title offered was not approved. It appears from said abstract that the following named parties may have some right, title, claim, or interest, and they are made defendants: Harney County, Oregon; Fred Haines; James F. Mahon estate; Lucy R. Mahon; Ira J. Mahon; Verda M. Mahon; Emily F. McMahon; Pearl R. Smyth; and Earle C. Miller, Trustee.

As to the Harney County tract (No. 4), the commissioners of Harney County executed an agreement to convey the said lands to the United States at $4.00 per acre on October 8. 1934. The agreement was entered into by the Secretary of Agriculture on December 26, 1934. The Government's abstract covering this tract was submitted to the Attorney General, and the title offered was not approved. It appears from said abstract that the following named parties may have some right, title, claim, or interest, and they are made defendants: The Harney County, Oregon; Myrtle (Haines) Caldwell; Dora Belle Chapman; Arthur L. Akers; First National Bank of Burns; H. D. Meyer, M.D.; J. M. Yoes; I. L. Hamilton; V. T. McCray; Anna Post; J C. Turney; J. M. Locher; Homer Denman; Charles Frye; Peter Cramer; N. A. Dibble; Peter Clemens; the heirs of Armenious C. Lynch; Loretta F. Meyer; and E. G. Kolbe.

As to the Lavina Griffin tract (No. 6), Lavina Griffin and Leslie Griffin, her husband, executed an agreement to convey said land to the United States at $8.75 per acre on September 14, 1934. This

agreement was entered into by the Secretary of Agriculture on December 26, 1934. The [7] Government's abstract covering this tract was submitted to the Attorney General, and the title offered was conditionally approved, subject to the release or extinguishment of oil and gas lease dated August 1, 1929, recorded in Miscellaneous Book C, page 144, Harney County records in favor of Earle C. Miller, Trustee and assigned to Oregon Oil Company on Novemer 30, 1929. It appears from said abstract that the following named parties may have some possible right, title, claim, or interest in this tract, and they are made defendants, namely; Lavina Griffin and her husband Leslie Griffin of Narrows, Oregon; Wellington G. Howell; W. G. Howell; Selonia Elliott; R. L. Hutton; Earle C. Miller, Trustee; Oregon Oil Company;

As to Gerald Griffin Tracts (No. 7,a), Leslie Griffin and Lavina Griffn, his wife, Narrows, Oregon; Mary Griffin and Francis Griffin, Burns, Oregon; the heirs of Gerald Griffin, deceased, executed agreements to convey the said tract to the United States at $8.75 per acre. These agreements were entered into by the Secretary of Agriculture on February 7, 1935, and the said vendors are made defendants hereto, but there remain outstanding the undivided interests of other heirs of Gerald Griffin from whom agreements have not been obtained. It appears from the Government's abstract covering these tracts that the following named parties may have some right, title, claim, or interest, and they are made defendants, namely: Gerald

Griffin, Spokane, Washington; Edwin R. Griffin, Narrows, Oregon; the heirs of Gerald Griffin, deceased. [8]

As to the Leona Creason and A. Creason tracts. (Nos. 10 and 10 a). Leona Creason, widow, executed an agreement to convey the said lands to the United States at $10.25 per acre on October 3, 1934. This agreement was entered into by the Secretary of Agriculture on January 9, 1935. The Government's abstract covering this tract was submitted to the Attorney General, and the title was approved conditionaly, subject to (1) evidence of the death of Alvess Creason and the administration and settlement of his estate; (2) release of leasehold by Myrtle Caldwell; (3) proof that A. Creason and Alvess Creason is one and the same person. According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants; Leona Creason, 720 North Jackson, Roseburg, Oregon; the unknown heirs of A. Creason, also known as Alvess Creason, and Myrtle Caldwell.

As to the John Creasman tract, (No. 12), Walla Creasman and Lucy Creasman, his wife, 1615 Fourth Street, La Grande, Oregon; Mrs. Edith Steele, Route 3, Union, Oregon, heirs of John Creasman, deceased, executed agreements to convey their undivided interests in said tract to the United States at $12.00 per acre, and these agreements were entered into by the Secretary of Agriculture on January 9, 1935, and the said vendors

are made defendants hereto; but there remain outstanding the undivided one-third interest of Marguarite Creasman, widow, and devisee of John Creasman, Jr., deceased, he being one of the three heirs of John Creasman, Sr., deceased, from whom an agreement has not been obtained. [9]

According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants hereto: Marguarite Creasman; Marguarite Grout and her hsuband, of Burns, Oregon.

As to the Horace M. Horton Tracts (Nos. 14, a, b), according to the County records, Horace M. Horton is the record owner of these lands, but he is dead and appears to have left a will, not probated, leaving these tracts to his widow for life and then to his two grandchildren whose names are unknown. Mrs. Horace M. Horton, widow, has expressed her willingness to sell this land to the United States at $10.00 per acre but she is not willing to bear the cost of an action to sell grandchildren's land and to administer her late husband's estate. According to the Government's abstract, the following named parties may have some right, title, claim or interest in this tract and they are made defendants: Mrs. Horace M. Horton, of Cherryville, Oregon; Mervin H. Horton, and his two children, whose names are unknown, 6075 Franklin Avenue, Hollywood, California; and other unknown heirs of Horace M. Horton, deceased; and the Pacific Live Stock Company.

As to the Mary A. George Tract (No. 16), agreements have been executed by Elbert F. George,

John Day, Oregon; Henry A. George and Lucille George, his wife, Mount Vernon, Oregon; Lee R. George, Mount Vernon, Oregon; Walter P. George and Echo George, his wife, John Day, Oregon, heirs of Mary A. George and Adam F. B. George, both deceased, to convey to the United States their undivided interests in this tract at $12.00 per acre. These agreements were entered into by the Secretary of Agriculture on February 7, 1935, and these vendors are made defendants hereto; but there remain outstanding the undivided interests of the [10] other heirs from whom agreements to convey have not been obtained. According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants: Georgia E. George of Corvallis, Oregon, the widow; Raymond L. George, and Clifford E. George, of Monroe, Oregon; Julian A. George; Mary A. George; William J. George; Anna Garry of Crane, Oregon; Eliza O. Shoemaker of Lindsay, California; Stacy D. George of Klamath Falls, Oregon; Harney Valley Irrigation District; Harney County National Bank; and J. E. Graves.

As to the H. L. Bechtel Tract (No. 26), H. L. Bechtel, unmarried, executed an agreement to convey the said tract to the United States at $11.00 per acre on November 2, 1934. This agreement was entered into by the Secretary of Agriculture on December 26, 1934. The Government's abstract covering this tract was submitted to the Attorney General, and the title offered was conditionally ap-

proved, subject (1) to release of a mortgage in favor of the State Land Board, dated July 15, 1921, recorded at Mortgage Book 1, page 198, Harney County records, to secure $600.00; (2) release of a mortgage in favor of the State Land Board, dated June 24, 1931, to secure $400.00 recorded at Mortgage Record M. Page 308 of Harney County records; and (3) release or extinguishment of oil and gas lease to Earle C. Miller, Trustee, dated July 8, 1929, recorded at Miscellaneous Book C, page 79, [11] Harney County records, and transferred to Oregon Oil Company November 30, 1929. According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants: H. L. Bechtel or Harry L. Bechtel of Preston, Oregon; Earle C. Miller, Trustee; Oregon Oil Company; and Grant Thompson, tenant.

As to the James Thompson and Gordon T. Cary Tracts, (No. 31,a) James Thompson and his wife executed an agreement to convey their undivided one-half interest in this tract to the United States at $7.00 per acre on October 23, 1934. This agreement was entered into by the Secretary of Agriculture on February 7, 1935, but there remain outstanding the undivided one-half interest of Gordon T. Cary from whom an agreement to sell has not been obtained. According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants: James Thompson and Emma Thompson his wife, of Red-

mond, Oregon; Gordon T. Cary, of Burns, Oregon; Rose Denman; Dr. H. D. Denman; Rebecca A. Cary; C. T. Cary; Clarence T. Cary; Effie A. Cary; Earle C. Miller, Trustee; and Oregon Oil Company.

As to the Maggie C. Catterson Tract (No. 33), Maggie C. Catterson, widow of William A. Catterson, deceased, executed an agreement to convey this tract to the United States at $8.00 per acre on November 1, 1934. This agreement was entered into by the Secretary of Agriculture on December 26,. 1934. The Government's [12] abstract covering this tract was submitted to the Attorney General and the title offered was conditionally approved, subject to release of the following mortgages in favor of Harney County National Bank; a mortgage dated July 14, 1921, (Mortgage Record I, page 212); a mortgage dated November 10, 1922, (Mortgage Record J, page 95); a mortgage dated May 10, 1923, (Mortgage Record J,. page 96); a mortgage dated February 20, 1924, (Mortgage Record J,. page 278); a mortgage dated December 9, 1924,) Mortgage Record J, page 458); a mortgage dated April 5, 1926, (Mortgage Record K, page 161); a mortgage dated April 19 1927, Mortgage Record K, page 480); a mortgage dated November 4,. 1927, (Mortgage Record L, page 35); a mortgage dated November 19, 1928, (Mortgage Record L page 246); a mortgage dated October 24, 1929, (Mortgage Record L. page 464), in Harney County Records, (2) evidence showing the administration and settlement of the estate of William A. Catter-

son who died June 23, 1930. According to the Government's abstract the following named parties may have some right, title, claim, or interest in this tract, and they are made defendants: Maggie C. Catterson, widow of William A. Catterson, deceased, Burns, Oregon; the unknown heirs, legatees, demisees and creditors of Wiliam A. Catterson; The Harney County National Bank.

As to the Thomas T. Dunn Tracts (No. 39,a), Thomas T. Dunn executed an agreement to convey this tract to the United States at $10.25 per acre on December 6, 1934. This agreement was entered into by the Secretary of Agriculture on January 9, 1935. The [13] Government's abstract covering this land was submitted to the Attorney General, and the title offered was conditionally approved, subject to the release or extinguishment of oil and gas lease from T. T. Dunn to Earle C. Miller, Trustee, dated December 3, 1928, recorded in Miscellaneous Book C, page 115, and transferred on November 30, 1929 to Oregon Oil Company; also oil and gas lease from Mrs. M. A. Dunn to Earle C. Miller, Trustee, dated December 3, 1928, recorded in Miscellaneous Book C, page 24, and transferred and assigned to Oregon Oil Company on November 30, 1929. According to the Government's abstract the following named parties may have some right, title, claim or interest in this tract, and they are made defendants: Thomas T. Dunn of Crane, Oregon; Ted Dunn; Thomas Tedy Dunn; T. T. Dunn; Earle C. Miller, Trustee; Oregon Oil Company; John W. Biggs; the heirs of P. F.

Dunn; Union No. 1 Gas and Oil Mining Association.

As to the W. J. Clarke (Joe Kado Place) Tract (No. 41), W. J. Clarke and Dorothy Dora Clarke, his wife, executed an agreement to convey this tract to the United States at $17.777 per acre on December 8, 1934. This agreement was entered into by the Secretary of Agriculture on December 29, 1934. According to the Government's abstract the following named parties may have some right, title, claim or interest in this tract and they are made defendants: W. J. Clark and Dorothy Dora Clark, his wife, of Redding, California; Sarah E. Kado; Sarah Kado; the unknown heirs of Joe Kado; William A. Harris; Henry Fairlee and his wife, Minnie Fairlee; L. O. Lakin; Earle C. Miller, Trustee; Oregon Oil Co.; Elvin Marshall; F. F. Lusk; German Saving and Loan Society. [14]

As to the Albert Hembree Tract (No. 49), Guy L. Hembree and Ura E. Hembree, his wife, of Klamath Falls, Oregon; Minnie E. Wooley and J. C. Wooley, her husband, of Harrisburg, Oregon; Ann E. Hamilton, of Enterprise, Oregon; Mary Alice Simmons, of 349 Matilda Street, Sunnyvale, California; Rose E. McGrath and George T. McGrath, her husband, of 1032 Washington Street, Hillsboro, Oregon; George T. McGrath and Rose E. McGrath, his wife, Hillsboro, Oregon; John L. Hembree, of Grants Pass, Oregon; and Emma A. M. Waterman, 4792 Panorama Drive, San Diego, California, all of them the heirs of Albert Hembree, de-

ceased, executed agreements to convey their interest in this tract to the United States at $10.00 per acre. These agreements were entered into by the Secretary of Agriculture on February 6, 1935, and these vendors are made defendants hereto, but there remain outstanding the undivided interests of Eugene E. Hembree and Loren C. Hembree from whom purchase agreements have not been obtained, and they are made defendants.

As to the Laura A. Dickenson Tract (No. 50), Nellie D. Miller and Clarence Miller, her husband, of French Glenn, Oregon; Maxine Bailey and Tom Bailey, her husband, of French Glenn, Oregon; Laura Rose Mattingly and Bud Mattingly, her husband, of Rockville, Oregon; J. C. Syme and Anna E. Syme, his wife, of Parma, Idaho, heirs of Laura A. Dickenson, deceased, have executed agreements to convey their interests in this tract to the United States at $8.75 per acre. These agreements were entered into by the Secretary of Agriculture on January 9, 1935, and the said vendors are made defendants hereto. The Government's abstract covering this tract was submitted to the Attorney General, and the title offered was conditionally [15] approved, subject to a showing as to the death of Laura A. Dickenson, and that her estate was properly administered; and that the parties signing these agreements are the sole and only heirs of said Laura A. Dickenson, deceased. According to the Government's abstract the following named parties may have some possible right, title, claim or interest in this tract, and they are made defendants: the

unknown heirs of Laura A. Dickenson; the heirs of Edward Dickenson, deceased; the heirs of Stella Dickenson, deceased, and the heirs of Roy Dickenson, deceased. [16] 6. All and singular the heirs, husbands, wives, devisees, executors, administrators, representatives, alienees, successors, assigns of each and every of the above named persons, firms and corporations; and all unknown owners, lienors and claimants having or claiming any right, title, estate, equity, interest or lien; and all occupants, lessees, licensees and users and holders and owners of or claimants to easements in, on, over, across or through said lands; and all persons, companies and corporations claiming any title or interest to or in any of said tracts of land; are made parties defendant to the end that they may come into Court and by proper pleadings make claim to said lands, or to the proceeds arising therefrom.

7. Simultaneously with the filing of this petition there is also to be filed a Declaration of Taking estimating the just compensation to be paid for the lands herein described. Shortly thereafter this estimated award will be paid into the registry of this Court under the provisions of the Declaration of Taking Act of Congress approved February 26, 1931, (46 Stat. 1421; 40 USCA 258a).

8. Wherefore, your petitioner prays: (a) That this Court pass an order reciting the filing of the Declaration and Petition herein, and the payment of the estimated just compensation for the taking of said land, and the effect thereof as to the vesting of title in the United States and the right to just

compensation in those entitled thereto, and directing that immediate possession of said land be delivered and taken; (b) that this Honorable Court will take jurisdiction of this cause, and will make and have entered all such orders, judgments and decrees as may be necessary to bring all of the known owners of said land before this Court, and to make all unknown parties having any interest therein parties defendant [17] hereto, and will appoint commissioners to appraise and fix the value of said lands and the amount of compensation, and all such other and further orders, judgments and decrees as may be necessary to vest said lands in fee simple absolute in the United States of America, and make just distribution of the estimated and final award among those entitled thereto as expeditiously as possible.

UNITED STATES OF
AMERICA
By CARL C. DONAUGH
United States Attorney for
the District of Oregon.
HUGH L. BIGGS
Assistant United States
Attorney.

(Duly verified by Hugh L. Biggs.)

[Endorsed]: Filed June 14, 1935. [18]

United States of America, In the District Court of the United States for the District of Oregon.

No. L-12492.

IN THE MATTER OF THE ACQUISITION BY THE UNITED STATES OF AMERICA OF 3474.34 ACRES, MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON.

DECLARATION OF TAKING.

I, M. L. Wilson, Acting Secretary of Agriculture of the United States, acting in such capacity, and duly authorized by the provisions of the Act for the Relief of Unemployment through the Performance of Useful Public Works, approved March 31, 1933, (48 Stat. 22), do hereby make and cause to be filed this Declaration of Taking, under and in accordance with the Act of Congress approved February 26, 1931, (46 Stat. 1421; 40 USCA 258a) and Acts supplementary thereto and amendatory thereof, and declare that: (1) Under Executive Order No. 6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work, the Secretary of Agriculture has selected for acquisition by the United States the lands hereinafter described for use in the construction of useful public works and improvements in connection with the establishment of the Lake Malheur Reservation Extension in Harney County, Oregon, and for such other uses as may be authorized by Congress or by Executive Order. The said lands are necessary and are required for immediate use

and in the opinion of the Secretary of Agriculture it is necessary, advantageous and in the interests of the United States that said lands be acquired by judicial proceeding as authorized by Act of Congress approved August 1, 1888 (25 Stat. 357; 40 USCA 257, 258), (2) a general description of the lands taken together with the estimated value of each tract follows: [20]

[Here follows the same description found in paragraph 3 of the petition.]

(3) the estate taken for said public uses is the fee simple title thereto subject only to existing public highways, and public utility easements, if any; (4) a plat showing the lands taken is annexed hereto as Schedule A, and made a part hereof; (5) the sum estimated by me as just compensation for said lands, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests whatsoever in said tracts, excepting only existing highways and public utility easements, if any, is Thirty-two Thousand Two Hundred Twenty-seven Dollars and Twenty-six cents, which sum is hereby deposited into the Registry of this Honorable Court for the use and benefit of the persons entitled thereto.

In my opinion the ultimate award for said lands will probably be within the total amount authorized under Executive Order No. 6724.

In Witness Whereof, I have signed this Declaration and caused the Seal of the Department of Agriculture to be hereto affixed on this 27th day of

March, 1935, at Washington in the District of Columbia.

Secretary's File Room.

[Seal] M. L. WILSON (Signed)
Acting Secretary of Agriculture of the United States of America.

(Department of Agriculture)

[Endorsed]: Filed June 14, 1935. [23]

And Afterwards, to wit, on Friday, the 14th day of June, 1935, the same being the 83rd Judicial day of the Regular March, 1935, Term of said Court; present the Honorable John H. McNary, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [25]

In the District Court of the United States
For the District of Oregon
No. L-12492

UNITED STATES OF AMERICA,
Petitioner,

vs.

3473.34 ACRES, MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON; HARNEY COUNTY, ET AL.,
Defendants.

JUDGMENT ON THE DECLARATION OF TAKING.

This cause coming on to be heard at this term of

Court upon the motion of the petitioner, the United States of America, to enter a judgment on the Declaration of Taking filed in the above-entitled cause on June 14, 1935, and for an order fixing the date when possession of the property herein described is to be surrendered to the United States of America, and upon consideration thereof and of the condemnation petition filed herein, said Declaration of Taking, the statutes in such cases made and provided and the Executive Orders of the President of the United States made pursuant to the authority contained in the Act of Congress approved March 31, 1933 (48 Stat. 22; 16 USCA 585), and It Appearing to the satisfaction of the Court;

First: That the United States of America is entitled to acquire property by eminent domain for the purposes as set out and prayed in said petition;

Second: That a petition in condemnation was filed at the request of the Secretary of Agriculture, the authority empowered by law to acquire the lands described in said petition, and also under authority of the Attorney General of the United States;

Third: That said petition and Declaration of Taking state the authority under which, and the public use for which said lands were taken; that the Secretary of Agriculture is the person duly [26] authorized and empowered by law to acquire lands such as are described in the petition for the purpose of the Lake Malheur Reservation Extension Project as stated in said Declaration, and that the Attorney General of the United States is the person

authorized by law to direct the institution of such condemnation proceedings;

Fourth: That a proper description of the land sought to be taken, sufficient for identification thereof, is set out in said Declaration of Taking;

Fifth: That said Declaration of Taking contains a statement of the estate or interest in the said lands taken for said public use;

Sixth: That a plat showing the lands taken is incorporated in said Declaration of Taking;

Seventh: That a statement is contained in said Declaration of Taking of a sum of money, estimated by said acquiring authority to be just compensation for said lands, in the amount of $32,227.26, and that said sum was deposited in the Registry of this Court, for the use of the persons entitled thereto, upon and at the time of the filing of the said Declaration of Taking;

Eighth: That a statement is contained in said Declaration of Taking that the amount of the ultimate award of compensation, for the taking of said property, in the opinion of the said Secretary of Agriculture, will be within any limits prescribed by Congress as to the price to be paid therefor; it is therefore, this 14th day of June, 1935,

Adjudged, Ordered and Decreed that the title to the following described lands [27]

[Here follows the same description found in paragraph 3 of the petition.]

(3) the estate taken for said public uses is the fee simple title thereto subject only to existing public highways, and public utility easements, if any; (4)

a plat showing the lands taken is annexed hereto as Schedule A, and made a part hereof; (5) the sum estimated by me as just compensation for said lands, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests whatsoever in said tracts, excepting only existing highways and public utility easements, if any, is Thirty-two Thousand Two Hundred Twenty-seven Dollars and Twenty-six cents, which sum is hereby deposited into the Registry of this Honorable Court for the use and benefit of the persons entitled thereto.

In my opinion the ultimate award for said lands will probably be within the total amount authorized under Executive Order No. 6724.

In Witness Whereof, I have signed this Declaration and caused the Seal of the Department of Agriculture to be hereto affixed on this 27th day of March, 1935, at Washington in the District of Columbia.

Secretary's File Room.

(Signed) M. L. WILSON

Acting Secretary of Agriculture of the United States of America. [30]

in fee simple, subject to existing public highways and public utility easements, if any, vested in the United States of America upon the filing of said Declaration of Taking and the depositing in the Registry of this Court of the said sum of $32,227.26, as hereinabove recited, on the 14th day of June, 1935, at two o'clock, P.M.; that said lands are

deemed to have been taken for the use of the United States of America; and the right to just compensation for the property taken vested in the persons entitled thereto; and the amount of compensation shall be ascertained and awarded in this proceeding and established by judgment herein pursuant to law, and

It Is Further Adjudged, Ordered and Decreed that the possession of the above-described property shall be delivered to the United States of America on or before the 15th day of July, 1935, and this cause is held open for such other and further orders, judgments and decrees as may be necessary in the premises.

Done and dated at Portland, Oregon, this 14th day of June, 1935.

JOHN H. McNARY
United States District Judge.

[Endorsed]: Filed June 14, 1935. [31]

And Afterwards, to wit, on the 19th day of July, 1935, there was duly Filed in said Court, a Supplemental Petition for Condemnation in words and figures as follows, to wit: [32]

[Title of District Court and Cause.]

SUPPLEMENT TO PETITION FOR CONDEMNATION

To the Honorable, the Judges of the United States District Court for the District of Oregon, comes

now the United States of America, the petitioner herein by Carl C. Donaugh, United States Attorney for the District of Oregon, and Hugh L. Biggs, Assistant United States Attorney for the District of Oregon, and having first obtained permission of the Court so to do does hereby file this its Supplement to the Petition for Condemnation which said Petition for Condemnation was filed in the above entitled Court on the fourteenth day of June, 1935, and alleges and represents to the Court as follows:

1. That since the filing of the original petition herein the government's abstracts of title to the lands described in said original petition have been completed and examined, and that it appears from an examination of said abstracts of title and an independent investigation thereof that, in addition to the defendants named in the petition on file herein, the following named persons, firms, associations and corporations have, or may have, some right, title, interest, easement, or right of way, in, to, upon or across the lands described in the Petition for Condemnation on file herein, and they are therefore made defendants in this cause to be served with process and to be required to answer or *or* otherwise plead or suffer themselves to be held in default herein. That the names of said additional defendants and lands or portions thereof in which they have or [33] may have some interest as aforesaid, is as follows, to-wit:

Harney County Tract (No. 4)—Lots 1, 4 and 5, Sec. 8 and Lot 2, Sec. 9, T. 27 S., R. 30 E.W.M.,

containing 123.47 acres, more or less, valued at $493.88 by the Secretary of Agriculture. Additional Defendants are Herbert W. Champneys, Receiver of the First National Bank of Burns, a national banking association; E. G. Kelbe; and Fred Haines.

Harney County Tracts: No. 4B—E½ NE¼ NE¼, E½ Lot 5, Sec. 19, T. 25 S., R. 33 E.W.M., containing 33.75 acres more or less, valued at $135.00 by the Secretary of Agriculture; No. 4C— SW¼ SW¼, Sec. 27, T. 25 S., R. 33 E.W.M. containing 40.00 acres, more or less, valued at $160.00 by the Secretary of Agriculture; No. 4D—Lot 13, Sec. 34, T. 25 S., R. 33 E.W.M., containing 35.10 acres, more or less, valued at $140.40 by the Secretary of Agriculture. Additional defendants are Herbert W. Champneys, Receiver of the First National Bank of Burns, a national banking association; Lucy Mahon; Emily F. McMahon; Pearl Smythe; Fred Haines; Earle C. Miller, Trustee; Ira J. Mahon, in his own proper person; and Ira J. Mahon as executor of the estate of James F. Mahon, deceased.

Harney County Tract (No. 4E)—Lots 1, 3 and 4 and S½ NE¼, N½ SW¼ and NW¼ SE¼, Sec. 16, T. 26 S., R. 33 E.W.M., containing 312.48 acres, more or less, valued at $1249.92 by the Secretary of Agriculture. Additional defendants are Henry W. Welcome; Myrtle Caldwell, formerly Myrtle Curtis; Dora Belle Chapman, formerly Dora Belle Curtis, and her husband Charles W. Chapman.

Gerald Griffin Tract (No. 7A)—Lots 1, 2 and 6,

Sec. 13, and all that tract or parcel of land lying East of the middle subdivision line of Sec. 13 of Lot 5, Sec. 13, T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 69.33 acres, more or less, valued at $606.64 by the Secretary of Agriculture. Additional defendants are State Land Board of Oregon; Harney County, Oregon; R. Louie Rasmussen and Sophie Rasmussen. [34]

Leona Creason and A. Creason Tract (No. 10 and 10A) Lots 3 and 4, and all of Lot 5 west of north and south center line of Sec. 13, about 34.14 acres; and S½ NW¼, Sec. 13; Lots 7 and 8 and SE¼ NE¼ and NE¼ and SE¼, Sec. 14; Lot 1, and NW¼ NE¼, Sec. 23, and Lots 1 and 2, Sec. 24, T. 26 S., R. 31 E.W.M. (North of Malheur Lake), containing 437.06 acres, more or less, valued at $4479.87 by the Secretary of Agriculture; and Lots 1, 2, 3, 4, 7, 8, 9 and 10, Sec. 25, T. 26 S., R. 30 E.W.M. (South of Malheur Lake); Lots 4, 5, 11, 12, 13 and 14, Sec. 30, T. 26 S., R. 31 E.W.M. (South of Malheur Lake), containing 242.05 acres, more or less, valued at $2481.01 by the Secretary of Agriculture. Additional defendants are Leona Creason, executrix of the estate of Alvess Creason, deceased; the unknown wife of Adam Robin if married on June 4, 1900; the unknown wife of William H. Robin, if married on April 1, 1901; Harry Rudsill.

John Creasman Tract (No. 12)—Lots 3, 6, 7, Sec. 18, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 80.38 acres, more or less, valued at $964.56 by the Secretary of Agriculture. Addi-

tional defendants are Frank Steele, husband of Mrs. Edith Steel; Frank Grout, husband of Marguerite Grout; and Bernice Creasman, a minor.

Horace M. Horton Tract (No. 14, A & B)—Lot 11, Sec. 4; Lot 6, Sec. 8, Lot 1, Sec. 10, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 44.57 acres, more or less, valued at $445.70 by the Secretary of Agriculture. Additional defendants are Maude Horton, widow of Horace M. Horton, deceased, in her own proper person; and Maude Horton, executrix of the estate of Horace M. Horton, deceased; Jean Horton, a minor; and Bill Horton, a minor.

Mary A. George Tract (No. 16)—Lots 1, 2 and 3, Sec. 1; Lots 1, 2, 6, 7, 8 and 9, Sec. 2, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 177.38 acres, more or less, valued at $2128.56 by the Secretary of Agriculture. Additional defendants are Edna George, wife of William J. George; Anna Cary and Harry Cary, her husband; E. O. Shoemaker, husband of Eliza A. Shoemaker; Betty George, wife of Stacy D. George; Edith Graves, wife of J. E. Graves. [35]

H. L. Bechtel Tract (No. 26)—Lots 5, 7, and 8, Sec. 23; Lots 1, and 2, Sec. 26, T. 25 S., R. 32½ EWM., containing 161.24 acres, more or less, valued at $1773.64 by the Secretary of Agriculture. Additional defendants are Henry L. Bechtel; State Land Board of Oregon; Calvin Clemmens.

James Thompson and Gordon T. Cary Tract (No. 31, A)—Lots 8 and 10 and W½ of Lot 5, Sec. 19, T. 25 S., R. 33 E.W.M., containing 46.67 acres, more

or less, valued at $326.69 by the Secretary of Agriculture. Additional defendant is Lucy Mahon.

W. J. Clarke (known as Joe Kado Place) Tract (No. 41)—Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; S½ SW¼; W½ NW¼; SE¼ NW¼; NE¼ SE¼, Sec. 36, T. 26 S., R. 31 E.W.M., (South of Malheur Lake), containing 506.46 acres, more or less, valued at $9003.34 by the Secretary of Agriculture. Additional defendants are Katie Harris, wife of William A. Harris; Eastern Oregon Livestock Company, a corporation; Jim Gibson; the unknown wife of Illario Pastoral, if married on April 29, 1886.

Albert Hembree Tract (No. 49)—Lots 5, 6 and 11, Sec. 25; Lots 1, 3, 4, and 5, Sec. 26, T. 26 S., R. 30 E.W.M. (South of Malheur Lake), containing 139.28 acres, more or less, valued at $1392.80 by the Secretary of Agriculture. Additional defendants are Blanche Moamau, and unknown husband of Blanche Moamau; Bryan Hamilton, husband of Annie Hamilton; Linnie Hembree, widow of Lorane C. Hembree, deceased; and the unknown heirs at law and the next of kin of Lorane C. Hembree; all of them the heirs of Albert Hembree, deceased.

The following named defendants are minors: Bernice Creasman, Jean Horton and Bill Horton. There may be other unknown persons who are minors, insane or otherwise incompetent for which reason the appointment of a guardian ad litem may be necessary for said minors and for all other defendants who are minors, insane or otherwise incompetent.

The prayer of original Petition is hereby renewed as to the additional defendants named herein.

UNITED STATES OF
AMERICA
By CARL C. DONAUGH
United States Attorney for
the District of Oregon.

HUGH L. BIGGS
Assistant United States Attorney. [36]

(Duly verified by Hugh L. Biggs.)

[Endorsed]: Filed July 19, 1935. [37]

And Afterwards, to wit, on the 9th day of September, 1935, there was duly filed in said Court, a Motion of Gordon T. Carey to Make Petition More Definite and Certain, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

MOTION OF GORDON T. CAREY, ET AL, TO MAKE MORE DEFINITE

Comes now Gordon T. Carey (erroneously spelled Gordon T. Cary), one of the defendants named in the above entitled suit and being the owner of an undivided one half of what is referred to in the Petition for Condemnation filed herein as James Thompson and Gordon T. Cary Tract (No. 31,a), and the defendants Georgia E. George, Raymond L. George, Clifford E. George, William J. George and Edna George, his

wife, Anna Carey (erroneously name in said petition as "Anna Garry" and Harry A. Carey, her husband, Eliza O. Shoemaker and E. O. Shoemaker, her husband, Stacy D. George and Betty M. George, his wife, defendants named in the above entitled Petition for Condemnation filed by the Government herein and being claimants to undivided interests in what is referred to in said petition as the Mary A. George Tract (No. 16), and move the Court for an Order requiring the Petitioner to make more definite and certain and more particular that portion of its said Petition on page 4 thereof reading:

"And together therewith all right, title, claim and interest of the owners of said tracts to lands lying within the Neal survey lines purporting to surround Malheur and Mud Lakes, and the Narrows,"

by requiring the United States of America to set forth and particularize what area within the Neal survey lines and in front of said Mary A. George tract (No. 16) and the James Thompson and Gordon T. Carey Tract (No. 31,a) the said Petitioner is seeking to acquire by condemnation proceedings herein.

L. A. LILJEQVIST
Attorney and Solicitor for Defendants above named,
Residence and Business Address, American Bank Building, Marshfield, Oregon. [39]

State of Oregon
County of Coos—ss.

I, L. A. Liljeqvist, do hereby certify that I am attorney for the defendants above named, and have prepared the foregoing Motion; that the same is

made in good faith and not for the purpose of delay, and in my judgment is well taken as a matter of law.

L. A. LILJEQVIST

Service of the within motion is accepted this 9th day of September, 1935.

CARL C. DONAUGH
United States Attorney
Attorney for Petitioner.

[Endorsed]: Filed September 9, 1935. [40]

And Afterwards, to wit, on Monday, the 25th day of January, 1937, the same being the 66th Judicial day of the Regular November, 1936, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [41]

[Title of District Court and Cause.]

ORDER OF SEVERANCE AS TO GORDON T. CAREY, ET AL.

Now at This Time this matter coming on for an order of severance upon stipulation of the parties orally made in open court, the parties hereto appearing by J. Mason Dillard, of counsel for plaintiff, and L. A. Liljeqvist, counsel for Gordon T. Carey, and Rebecca Carey not appearing either in person or by counsel but being merely a nominal party defendant hereto and having heretofore made and entered no appearance in said proceeding, that an order of severance be taken as to said defendants and an undivided one-half interest in and to the following described real property:

Lots Eight (8) and Ten (10) and the West One-Half (W½) of Lot Five (5), Section Nineteen (19), Township Twenty-five (25) South, Range Thirty-there (33) East, Willamette Meridian, containing 46.67 acres.

and for leave on the part of plaintiff to file an amended petition herein as against the above named defendants and the above-described real property, excluding therefrom any and all portions of said above-described real property lying within the Neal Survey Line as described in the original and supplemental petition herein, the court at this time, being fully advised in the premises, makes the following order: [42]

It Is Hereby Ordered that severance be had in the above-entitled action as to said above-named defendants and an undivided one-half interest in the said above-described real property, and that leave be, and it is hereby granted, to plaintiff herein to file an amended petition as against said defendants and said above-described real property, excluding therefrom, however, any and all portions of said real property lying within the Neal Survey Line.

Done and dated at Portland, Oregon, this 25th day of January, 1937.

JAMES ALGER FEE
Judge

Approved:

L. A. LILJEQVIST
Attorney for Gordon T. Carey.

[Endorsed]: Filed January 25, 1937. [43]

And Afterwards, to wit, on Monday, the 25th day of January, 1937, the same being the 66th Judicial day of the Regular November, 1936, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [44]

[Title of District Court and Cause.]

ORDER OF SEVERANCE AS TO WILLIAM J. GEORGE, ET AL

Now at This Time this matter coming on for an order of severance upon stipulation of the parties orally made in open court, the parties hereto appearing by J. Mason Dillard, of counsel for plaintiff, and L. A. Liljeqvist, counsel for William J. George and Edna George, his wife; Anna Carey and Harry Carey, her husband; Eliza O. Shoemaker and E. O. Shoemaker, her husband; and Stacy D. George and Betty E. George his wife, that an order of severance be taken as to said defendants and an undivided four-ninths interest in and to the following described real property:

> Lots One (1), Two (2) and Three (3) Section One (1); Lots One (1), Two (2), Six (6), Seven (7), Eight (8) and Nine (9), Section Two (2), Township Twenty-six (26) South, Range Two (2) East, Willamette Meridian, north of Malheur Lake, containing 177.38 acres, more or less.

and for leave on the part of plaintiff to file an amended petition herein as against the above-named defendants and the above-described real property, excluding therefrom any and all portions of said

above-described real property lying within the Neal Survey Line as described in the original and supplemental petition herein, the court at this time, being fully advised in the premises, makes the following order: [45]

It Is Hereby Ordered that severance be had in the above-entitled action as to said above named defendants and an undivided four-ninths interest in the said above-described real property, and that leave be, and it is hereby granted, to plaintiff herein to file an amended petition as against said defendants and said above described real property, excluding therefrom, however, any and all portions of said real property lying within the Neal Survey Line.

Done and dated at Portland, Oregon, this 25th day of January, 1937.

JAMES ALGER FEE
Judge

Approved:

L. E. LILJEQVIST
Attorney for Defendants,
Anna Carey, Harry Carey, William J. George, Edna George, Eliza O. Shoemaker, E. O. Shoemaker, Stacy D. George, and Betty E. George.

[Endorsed]: Filed January 25, 1937. [46]

And Afterwards, to wit, on the 27th day of January, 1937, there was duly Filed in said Court, an Amended Petition for Condemnation as to Gordon

T. Carey tract, in words and figures as follows, to wit: [47]

[Title of District Court and Cause.]

AMENDED PETITION FOR CONDEMNATION AS TO GORDON T. CAREY

To the Honorable, the Judges of the United States District Court for the District of Oregon:

On the 14th day of June, 1935, there was filed in this court a Petition for Condemnation entitled: United States vs. 3474.34 Acres, more or less, of land in Harney County, Oregon, No. 12,492 At Law, including, with other lands, the land hereinafter described; a supplement thereto was filed on July 19, 1935, and on the 25th day of January, 1937, this court permitted the severance of said hereinafter-described tract of land from said proceeding, and permitted the filing of this amended petition for condemnation.

This amended petition of the United States, by Carl C. Donaugh, United States Attorney for the District of Oregon, respectfully shows that:

1. This petition is filed under the authority and provisions of Acts of Congress entitled: "An Act for the Relief of Unemployment Through the Performance of Useful Public Work, and for Other Purposes", approved March 31, 1933 (Chap. 17, 48 Stat. 22), as continued to March 31, 1937, [48] by Section 14 of the Emergency Relief Appropriation Act for 1935 (Pub. Res.—No. 11—74th Congress); the Fourth Deficiency Act Fiscal Year 1933" (Ch. 100, 48 Stat. 274) and pursuant to Executive Order No.

6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work.

2. By the Act for the Relief of Unemployment through the Performance of Useful Public Work (48 Stat. 22) Congress declared a three-fold purpose, namely: (a) to relieve the acute condition of widespread distress and unemployment; (b) to provide for the restoration of the country's depleted natural resources; and (c) the advancement of an orderly program of useful public works. The President was thereby authorized to utilize existing departments, including the Department of Agriculture, to provide employment in the construction of public works. Congress thereby enumerated several types of work to be done, including (1) forestation of lands; (2) prevention of forest fires; (3) Prevention of floods; (4) prevention of soil erosion; (5) control of plant pests; (6) control of diseases; (7) construction of paths; (8) construction of trails; (9) construction of firelanes, and other work of the general character enumerated. The characteristics of the specified types of work, and of other work so authorized to be done, were that they were: (a) to relieve unemployment, (b) to restore depleted natural resources, and (c) to be useful public works. The work was authorized to be done, among other places, in national parks, in national forests, on Government reservations, and upon lands to be acquired by purchase, donation, condemnation, or otherwise. The term "Government Reservation as used in this Act included the Lake Malheur Reservation established by Executive Or-

der No. 929, dated August 18, 1908, located in Harney County in the State of Oregon. [49]

3. Section 2 of this Act (48 Stat. 22) authorized the acquisition of lands, as follows:

> "For the purposes of carrying out the provisions of this Act * * * the President, or the head of any department or agency authorized by him to construct any project or to carry on any such public works, shall be authorized to acquire real property by purchase, donation, condemnation, or otherwise, * * * ."

4. Under this Act (48 Stat. 22), and by authority of the President, the Secretary of Agriculture has duly adopted an emergency conservation works project for the improvement of the Lake Malheur Reservation. This project includes the construction of dikes; the building of water-control structures; the conservation of water; the control of flood-waters; the construction of truck trails; food and cover planting; fire protection; and the building of nesting islands to provide additional food and cover for waterfowl. One of the largest dikes being constructed on the Lake Malheur Reservation is the Cole Island Dike, which is essential in order to prevent the spreading out and evaporation of the inadequate supply of available water. This dike is being elevated and a truck trail will be built thereon for *sevicing* the control structures and shortening patrol routes. It will be so elevated as to allow the truck trail thereon to be used at all times regardless of flood-water conditions within the Reservation. Approximately 75 miles of additional truck trails are to be

constructed around the exterior boundaries of the Reservation for patrol and fire-prevention purposes. Four lookout towers are to be erected for fire protection and patrol purposes. More than 37 miles of fencing is to be erected and maintained. Open ditches and earth embankments are to be constructed for water-control purposes. Several thousand acres are to be planted with trees, and large areas within the Reservation are to be planted for the production of food and cover for nesting waterfowl. Two emergency conservation works camps have already been established to carry on this work, and approximately 400 men have been and will be employed in the improvement of the Lake Malheur Reservation. This [50] program of improvement is effective to relieve unemployment, restore depleted natural resources, and will result in the construction of useful public works.

5. The tract of land described in paragraph 7 hereof is requisite and necessary to be fully vested in the United States of America, free and clear of all outstanding claims of ownership, for the reason that a part of said emergency conservation work is necessary to be done thereon, or because the said land will be affected thereby. The public use for which said lands now are required is the accomplishment of the emergency conservation works project herein described, but the said lands are also to be used as a part of the Lake Malheur Reservation for the restoration and conservation of migratory birds in furtherance of the objects of the Migratory Bird Treaty (39 Stat. 1702), the Migratory Bird Treaty

Act (40 Stat. 755), the Migratory Bird Conservation Act (46 Stat. 1222), and for such other public uses as may be authorized by Congress or by Executive order.

6. In the opinion of the Secretary of the United States Department of Agriculture it has become necessary and advantageous to the United States Government to acquire all outstanding right, title, claim and interest in and to the land herein described in paragraph 7 by condemnation under judicial process. The Secretary of the United States Department of Agriculture has duly made application to the Attorney General of the United States to commence proceedings for the condemnation of any outstanding right, title, claim, and interest in the land herein described in paragraph 7; the Attorney General of the United States has duly instructed the United States Attorney for the District of Oregon to institute proceedings for the condemnation thereof; and these proceedings are duly brought under instructions from the Department of Justice of the United States, and under the Act of Congress approved [51] August 1, 1888, entitled, "An Act to Authorize the Condemnation of Land for Sites of Public Buildings, and for Other Purposes" (35 Stat. 357) U.S.C.A. 357-358.

7. The property sought to be acquired and appropriated by the United States of America for the purposes aforesaid is described as follows:

"The James Thompson and Gordon T. Carey Tract (No. 31,a)—Lots 8 and 10 and W½ of

Lot 5, Sec. 19, T. 25 S., R. 33 E.W.M., containing 46.67 acres, more or less, valued at $326.69."

Due notice has been given and published as against all claimants to this tract and the only outstanding claimant thereto is Gordon T. Carey, who is made defendant hereto.

8. The property sought to be acquired does not include any rights which the defendant may have or claim as appurtenant to said lands because riparian thereto, and it does not include any rights, title, interest or estate of the defendant to lands or waters inside the Neal Survey lines, claimed by the defendant to be meander lines of "Malheur Lake" as shown by and in accordance with the official plat of said Township 26 South, Range 32 E.W.M. (N.M.L.) as approved by the General Land Office and on file with the Surveyor General; and it also does not include any lands claimed to be relicted lands within the Malheur Lake Division, as described in the United States Supreme Court decree dated June 3, 1935, in re United States vs. Oregon recorded at Book 36, page 546, Harney County, Oregon, records.

9. James Thompson and wife executed an agreement to convey their undivided one-half interest in the lands described in paragraph 7 hereof to the United States at $7.00 per acre on October 23, 1934. This agreement was entered into by the Secretary of Agriculture on February 7, 1935, but there remained outstanding the undivided one-half interest of Gordon T. Carey from whom an agreement to sell has not been obtained. According to the Government's abstract Gordon T. Carey may have some

right, title, claim or interest in this tract of land and he is made a defendant [52] hereto. Simultaneously with the filing of the original petition herein there was filed a declaration of taking estimating $326.69 as the value of the lands described in paragraph 7 hereof. This estimated award was subsequently paid into the Registry of the United States District Court. Under the provisions of the Declaration of Taking Act (46 Stat. 1421) and subsequently, an order for possession was made and entered in the proceeding entitled United States of America vs. 3474.34 Acres, No. 12,492 At Law, fixing the 15th day of July, 1935, as the date for the surrender of possession, and this order found that title to the said tract of land had become vested in the United States and the right to just compensation therefor had become vested in those entitled thereto. Subsequently James Thompson and wife have applied for and accepted the sum of $163.34 in full satisfaction and payment for their undivided one-half interest in the lands described in paragraph 7 hereof.

10. Diligent and repeated efforts have been made by this petitioner to avoid the expense and delay of this litigation, both to it and to the defendants, by the purchase of the lands described in paragraph 7 hereof, but it has been impossible to arrive at a purchase-price basis satisfactory to Gordon T. Carey.

11. Wherefore, your petitioner prays that this Honorable Court will take jurisdiction of this cause and make and have entered all such orders, judgments and decrees as may be necessary to bring all of the known owners of the said lands and area be-

fore this Court and to make all unknown persons having any interest therein parties defendant hereto, and will appoint commissioners to appraise and fix the value of said land and the amount of compensation which the owners thereof are entitled to for its appropriation, and all such other and further orders, judgments and decrees as may be necessary to award it the possession of [53] the area hereinabove described, and that the absolute title in fee simple to the said area be and thereby vest in the United States of America and divest it out of all other persons.

UNITED STATES OF AMERICA,

s/ By CARL C. DONAUGH
United States Attorney for the District of Oregon

s/ J. MASON DILLARD
Assistant United States Attorney

(Duly Verified by J. Mason Dillard.) [54]

United States of America
District of Oregon—ss.

I, J. Mason Dillard, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Amended Petition For Condemnation on the defendant, Gordon T. Carey, by depositing in the United States Post Office at Portland, Oregon, on the 27th day of January, 1937, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid,

addressed to L. A. Liljeqvist, Attorney at Law, Marshfield, Oregon, attorney for said defendant.

s/ J. MASON DILLARD
Assistant United States Attorney

[Endorsed]: Filed January 27, 1937. [55]

And Afterwards, to wit, on the 27th day of January, 1937, there was duly Filed in said Court, an Amended Petition For Condemnation of Mary A. George tract, in words and figures as follows, to wit: [56]

United States of America
In the United States District Court
for the District of Oregon
No. L 12492 At Law

UNITED STATES OF AMERICA,
Petitioner,

vs.

177.38 Acres, more or less, of land in Harney County, Oregon; and Stacy D. George and Betty M. George, his wife; William J. George and Edna George, his wife; Anna George Carey and Harry A. Carey, her husband; Eliza A. George Shoemaker and E. P. Shoemaker, her husband,
Defendants.

AMENDED PETITION FOR CONDEMNATION AS TO WILLIAM J. GEORGE, ET AL.

To the Honorable, the Judges of the United States District Court for the District of Oregon:

On the 14th day of June, 1935, there was filed in this court a Petition for Condemnation entitled, United States vs. 3474.34 Acres, more or less, of land in Harney County, Oregon, No. 12,492 At Law, including, with other lands, the land hereinafter described; a supplement thereto was filed on July 19, 1935, and on the 25th day of January, 1937, this court permitted the severance of the said hereinafter-described tract of land from said proceeding, and permitted the filing of this amended petition for condemnation.

This amended petition of the United States, by Carl C. Donaugh, United States Attorney for the District of Oregon, respectfully shows that:

1. This petition is filed under the authority and provisions of Acts of Congress entitled: "An Act for the Relief of Unemployment Through the Performance of Useful Public Work, and for Other Purposes", approved March 31, 1933 (Chap. 17, 48 Stat. 22), as continued to March 31, 1937, by Section 14 of the Emergency Relief Appropriation Act for 1935 (Pub. Res.—No. 11—74th Congress); [57] the Fourth Deficiency Act, Fiscal Year 1933" (Chap. 100, 48 Stat. 274, 275) and pursuant to Executive Order No. 6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work.

2. By the Act for the Relief of Unemployment Through the Performance of Useful Public Work (48 Stat. 22) Congress declared a threefold purpose, namely: (a) to relieve the acute condition of widespread distress and unemployment; (b) to

provide for the restoration of the country's depleted natural resources; and (c) the advancement of an orderly program of useful public works. The President was thereby authorized to utilize existing departments, including the Department of Agriculture, to provide employment in the construction of public works. Congress thereby enumerated several types of work to be done, including (1) forestation of lands; (2) prevention of forest fires; (3) prevention of floods; (4) prevention of soil erosion; (5) control of plant pests; (6) control of diseases; (7) construction of paths; (8) construction of trails; (9) construction of fire lanes; and other work of the general character enumerated. The characteristics of the specified types of work, and of other work so authorized to be done, were that they were; (a) to relieve unemployment; (8b) to restore depleted natural resources, and (c) to be useful public works. The work was authorized to be done, among other places, in national parks, in national forests, on Government reservations, and upon lands to be acquired by purchase, donation, condemnation, or otherwise. The term "Government reservation" as used in this Act included Lake Malheur Reservation established by Executive Order No. 929, dated August 18, 1908, located in Harney County in the State of Oregon.

3. Section 3 of this Act (48 Stat. 22) authorized the acquisition of lands as follows: [58]

"For the purpose of carrying out the provisions of this Act * * * the President, or the head of any

department or agency authorized by him to construct any project or to carry on any such public works, shall be authorized to acquire real property by purchase, donation, condemnation, or otherwise, * * *."

4. Under this Act (48 Stat. 22), and by authority of the President, the Secretary of Agriculture has duly adopted an emergency conservation works project for the improvement of the Lake Malheur Reservation. This project includes the construction of dikes; the building of water-control structures; the conservation of water; the control of flood-waters; the construction of truck trails; food and cover planting; fire protection; and the building of nesting islands to provide additional food and cover for waterfowl. One of the largest dikes being constructed on the Lake Malheur Reservation is the Cole Island Dike, which is essential in order to prevent the spreading out and evaporation of the inadequate supply of available water. This dike is being elevated and a truck trail will be built thereon for servicing the control structures and shortening patrol routes. It will be so elevated as to allow the truck trail thereon to be used at all times regardless of flood-water conditions within the Reservation. Approximately 75 miles of additional truck trails are to be constructed around the exterior boundaries of the Reservation for patrol and fire-prevention purposes. Four look-out towers are to be erected for fire protection and patrol purposes. More than 37 miles of fencing is to be erected and maintained. Open ditches and earth

embankments are to be constructed for water-control purposes. Several thousand acres are to be planted with trees, and large areas within the Reservation are to be planted for the production of food and cover for nesting waterfowl. Two emergency conservation works camps already have been established to carry on this work, and approximately 400 men have been and will be employed in the improvement of the Lake Malheur Reservation. This program of improvement is effective to relieve unemployment, restore depleted natural resources, and will result [59] in the construction of useful public works.

5. The tract of land described in Paragraph 7 hereof is requisite and necessary to be fully vested in the United States of America, free and clear of all outstanding claims of ownership, for the reason that a part of said emergency conservation work is necessary to be done thereon, or because the said land will be affected thereby. The public use for which the said lands are now required is the accomplishment of the emergency conservation works project herein described, but the said lands are also to be used as a part of the Lake Malheur Reservation for the restoration and conservation of migratory birds in furtherance of the objects of the Migratory Bird Treaty (39 Stat. 1702), the Migratory Bird Treaty Act (40 Stat. 755), the Migratory Bird Conservation Act, (46 Stat. 1222), and for such other public uses as may be authorized by the Congress or by Executive Order.

6. In the opinion of the Secretary of the United

States Department of Agriculture it has become necessary and advantageous to the United States Government to acquire all outstanding right, title, claim and interest in and to the lands described in Paragraph 7 hereof by condemnation under judicial process. The Secretary of the United States Department of Agriculture has duly made application to the Attorney General of the United States to commence proceedings for the condemnation of any outstanding right, title, claim and interest in the land described in paragraph 7 hereof, the Attorney General of the United States has duly instructed the United States Attorney for the District of Oregon to institute proceedings for the condemnation thereof; and these proceedings are duly brought under instructions from the Department of Justice of the United States, and under the Act of Congress approved August 1, 1888, entitled, "An Act to Authorize the Condemnation of Land for Sites of Public Buildings, and for other Purposes" (35 Stat. 357) U.S.C.A. 357-358. [60]

7. The property sought to be acquired and appropriated by the United States of America for the purposes aforesaid is described as follows:

> "The Mary A. George Tract (No. 16)—Lots 1, 2 and 3, Sec. 1; Lots 1, 2, 6, 7, 8 and 9, Sec. 2, T. 26 S., R. 32 E.W.M. (North of Malheur Lake), containing 177.38 acres, more or less."

8. The property sought to be acquired does not include any rights which the defendants may have or claim as appurtenant to said lands because ripa-

rian thereto, and it does not include any rights, title, interest or estate of the defendants to lands or waters inside the Neal Survey lines, claimed by defendants to be meander lines of "Malheur Lake" as shown by and in accordance with the official plat of said Township 26 South, Range 32 E.W.M. (N.M.L.) as approved by the General Land Office and on file with the Surveyor General; and it also does not include any lands claimed to be relicted lands within the Malheur Lake Division, as described in the United States Supreme Court decree dated June 3, 1935 in re United States vs. Oregon recorded in Book 36, page 546, Harney County, Oregon, records.

9. The original petition for condemnation filed in re United States vs. 3474.34 Acres, No. L-12492, named as defendants all possible claimants to the Mary A. George Tract (No. 16) described in paragraph 7 hereof, and due notice has been given by summons and by publication as against all possible claimants to the said tract. There has been filed in the said original proceeding, by L. A. Liljeqvist, Esquire, their Solicitor, a motion in behalf of William J. George, Edna George, his wife; Anna George Carey and Harry A. Carey, her husband; Eliza O. George Shoemaker and E. O. Shoemaker, her husband; Stacy D. George and Betty M. George, his wife, with reference to an undivided interest in the said Mary A. George tract (No. 16). The said defendants so represented by L. A. Liljeqvist, Esquire, their solicitor, are made defendants in this separate supplemental and amended petition. The purpose of said motion was to require the United

States [61] of America to specify what additional lands were intended to be acquired other than Lots 1, 2 and 3, Sec. 1; and Lots 1, 2, 6, 7, 8 and 9, Sec. 2, T. 26 S., R. 32 E.W.M. (NML) containing 177.38 acres. There has been deposited in the Registry of the United States District Court for the District of Oregon the sum of Two Thousand One Hundred and Twenty-eight Dollars and Fifty-six cents ($2,128.56), that being the estimated award for the said Mary A. George Tract (No. 16) as set forth in a declaration of taking filed therein. A portion of this estimated award so paid into the court has been withdrawn upon application of the heirs of Mary A. George and Adam F. B. George, both deceased, but there remains on deposit in the Registry of this Court a portion thereof to cover the right, title, claim and interest of the remainder of said heirs, which estimated award as to their undivided interest may be withdrawn by the defendants hereto upon application to and order by the United States District Court under the provisions of the Declaration of Taking Act (46 Stat. 1421) without prejudice to any claim that the said defendants may desire to make for more money than the said estimated award for said tract, and also without prejudice to any claim that they may desire to make as to ownership within the said Malheur Lake Division lying adjacent to the said Mary A. George Tract (No. 16).

10. Diligent and repeated efforts have been made by this petitioner to avoid the expense and delay of this litigation, both to it and to the defendants,

by the purchase of the lands described in paragraph 7 hereof, but it has been impossible to arrive at a purchase-price basis satisfactory to the defendants hereto.

11. Wherefore your petitioner prays that this Honorable Court will take jurisdiction of this cause and make and have entered all such orders, judgments and decrees as may be necessary to bring all of the known owners of the said lands and area before this Court and to make all unknown persons having any interest [62] therein parties defendant hereto, and will appoint commissioners to appraise and fix the value of said land and the amount of compensation which the owners thereof are entitled to for its appropriation and all such other and further orders, judgments and decrees as may be necessary to award it the possession of the area hereinabove described, and that the absolute title in fee simple to the said area be and thereby vest in the United States of America and divest it out of all other persons.

UNITED STATES OF
AMERICA.
By CARL C. DONAUGH,
United States Attorney for
the District of Oregon.
s/ J. MASON DILLARD,
Assistant United States Attorney.

(Duly Verified by J. Mason Dillard.) [63]

United States of America,
District of Oregon—ss.

I, J. Mason Dillard, Assistant United States Attorney for the District of Oregon, hereby certify that I have made service of the foregoing Amended Petition for Condemnation on the within defendants by depositing in the United States Post Office at Portland, Oregon, on the 27th day of January, 1937, a duly certified copy thereof, enclosed in an envelope, with postage thereon prepaid, addressed to L. A. Liljeqvist, Attorney at Law, Marshfield, Oregon, attorney for said defendants.

s/ J. MASON DILLARD,
Assistant United States Attorney.

[Endorsed]: Filed January 27, 1937. [64]

And Afterwards, to wit, on the 9th day of March, 1939, there was duly Filed in said Court, a Petition of Stacy D. George, et al. for the payment of money, in words and figures as follows, to wit: [65]

In the District Court of the United States for the District of Oregon

In the Matter of the Acquisition by the United States of America of 3474.34 Acres, more or less, of land in Harney County, Oregon.

PETITION OF STACY GEORGE AND BETTY GEORGE FOR PAYMENT OF MONEY ON DEPOSIT.

To the Honorable Judges of the United States District Court for the District of Oregon:

The undersigned petitioners, Stacy D. George and Betty George, his wife, defendants in the above-entitled special proceedings respectfully show as follows:

1. By the Petition for Condemnation, Declaration of Taking and payment of the estimated award into the registry of this Court the United States of America on June 14, 1935, took title to the Mary A. George Tract (No. 16), containing 177.38 acres, more or less, of patented land in Harney County, Oregon, consisting of

Lots 1, 2 and 3 Section 1;

Lots 1, 2, 6, 7, 8 and 9 Section 2, Township 26 S., R. 32 E.W.M. (N.M.L.)

together with all rights to water thereunto appertaining. The said condemnation proceeding was described as intended to acquire all right, title, claim and interest of the owners of said patented lands in, to, on and over all adjacent lands within the Malheur Division of the Lake Malheur Reservation which might belong to them, but it has been stipulated and arranged that the claims of ownership asserted by the owners of an undivided four-ninths interest in the said Mary A. George Tract

of patented land, including the rights of these petitioners, if any, shall be determined in the receivership proceedings now pending in this Court entitled "United States vs. Otley and others" E-96 77. [66]

2. These petitioners now elect to accept one-ninth of the estimated award of $2,128.56, deposited in the registry of this Court as full and just compensation to them for the taking of their entire ownership in the said patented lands amounting to $236.50, less $13.20, deducted as their proportionate share of the taxes against said land, leaving $223.30 to be paid to them without prejudice to any right or claim which they might ultimately have for additional compensation in the event they are awarded any ownership within the Malheur Division of the Lake Malheur Reservation. As to their undivided one-ninth interest in said patented land they represent and warrant that they are the only persons entitled to be compensated therefor; that there are no mortgages, judgments or other liens against their interest therein and that there are no taxes due and exigible against said land which are not covered by the $13.20 which is to be retained by the Government to cover such taxes as may have been due at the time when the title vested in it in these proceedings.

Wherefore these petitioners pray that this Court will direct the Clerk of the United States District Court for the District of Oregon to make payment of the funds now on deposit in the registry of this Court in this cause in the following manner: $223.30

to be paid to Stacy D. George and Betty George and the check to be mailed to Stacy D. George at Klamath Falls, Oregon.

STACY D. GEORGE,
BETTY GEORGE.

(Duly Verified by Stacy D. George and Betty George.)

[Endorsed]: Filed March 9, 1939. [67]

And Afterwards, to wit, on Thursday, the 9th day of March, 1939, the same being the 4th Judicial day of the Regular March, 1939, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [68]

In the District Court of the United States for the District of Oregon

UNITED STATES OF AMERICA,
Petitioner,

vs.

3474.34 Acres, more or less, of land in HARNEY COUNTY, OREGON; HARNEY COUNTY, et al.,
Defendants.

ORDER FOR PAYMENT

This Matter coming on for hearing, upon Petition of Stacy D. George and Betty George, his wife, the owners of an undivided one-ninth interest in and to the following described tract of land, to-wit:

Lots One (1), Two (2) and Three (3), Section One (1); Lots One (1), Two (2), Six (6), Seven (7), Eight (8) and Nine (9), Section Two (2), Township Twenty-six (26) South, Range Thirty-two (32) E.W.M. (N.M.L.)

and defendants in the above-entitled action, for payment of their undivided interest in the purchase price of this land as described in the Petition for Condemnation in this cause, and it appearing to the satisfaction of the Court that on the 14th day of June, 1935, the United States of America filed its Petition for Condemnation of the land in which said defendants have an undivided one-ninth interest, in Harney County, Oregon, hereinabove described, and on the same day M. L. Wilson, Acting Secretary of Agriculture of the United States, acting in such capacity and duly authorized, filed a Declaration of Taking in the above-entitled proceeding, taking the hereinabove described lands in which the defendants have an undivided one-ninth interest, in fee for the use and benefit of the United States, and pursuant thereto a Judgment was rendered on the Declaration of Taking, finding that the United States had complied with the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421; 40 USCA 258a), and that the title to all of the lands described in said Declaration of Taking has become vested in the United States of America, and it [69] further appearing to the satisfaction of the Court from said Petition for Payment for said lands and from the statement

of counsel for the United States in said proceedings that the said Stacy D. George and Betty George are entitled to an undivided one-ninth interest in and to the purchase price of the parcel of land described in this Order.

It Is Therefore Ordered that G. H. Marsh, Clerk of the United States Court for the District of Oregon, be and he is hereby directed to pay from the funds deposited in the Registry of the Court for that purpose in the above-entitled proceeding to Stacy George and Betty George, his wife, the sum of $223.30, being their undivided one-ninth interest in $2,128.56 ($236.50), less $13.20, their proportionate share of taxes.

JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed March 9, 1939. [70]

And Afterwards, to wit, on the 22nd day of August, 1939, there was duly Filed in said Court, an Answer of Gordon T. Carey to Amended Petition, in words and figures as follows, to wit: [71]

[Title of District Court and Cause.]

ANSWER OF GORDON T. CAREY TO PETITIONER'S AMENDED PETITION IN CONDEMNATION

Comes now Gordon T. Carey and for answer to

petitioner's amended petition in the above entitled cause, denies and alleges as follows:

1.

Denies each and every allegation and statement made in Paragraphs I to X, inclusive, of said amended petition, except as admitted or alleged in the further and separate answer herein.

FURTHER AND SEPARATE ANSWER

For a further and separate answer to the said amended petition, said Gordon T. Carey alleges as follows:

I.

That he is the owner of an undivided one-half interest in the lands described in the amended petition as Lots 8 and 10 and the West Half of Lot 5, of Section 19, T. 25, S.R. 33 E.W.M., containing 46.67 acres of land.

II.

That said lands above described are that part of said lots above the Meander Line of Malheur Lake. That the elevation of the waters of said Malheur Lake are about four (4) feet higher in the high water season of the year than such waters are at the low water season of the year. That the high water season of Malheur Lake occurs in the spring of the year when the waters of said lake flow out over the Meander Line at the premises above described and irrigate and saturate the lands above described. That during the summer months the waters of said lake recede to a point below the said Meander Line and said lands above

describe, by [72] reason of having been flooded and irrigated as aforesaid from said Malheur Lake, produce grass, hay and other agricultural crops.

III.

That the area below and within the said Meander Line has, for many years, produced a large amount of feed for ducks and other water fowl and each year thousands of ducks and other water fowl are attracted to the said Malheur Lake and remain there and feed upon the lake and surrounding lands. That many of such ducks and other water fowl come upon and fly over the lands heretofore described, and during the open or hunting season of each year, the lands of the defendant's, above described, are valuable as a hunting ground and as a duck-shooting ground.

IV.

That since the petitioner herein secured possession of the above described lands by order of this Court in this case, the petitioner has constructed a large dyke across the said Malheur Lake for the purpose of keeping the waters of said Malheur Lake from reaching or overflowing the said lands above described, and for the further purpose of preventing the waters of said lake from reaching or overflowing that part of Malheur Lake abutting or adjoining the said lands. Prior to the construction of said dyke by the petitioner, the lands above described were valuable as grass, hay and agricultural lands, as well as valuable as a hunting or duck-shooting ground.

V.

That said lands were, at the time the petitioner took possession of the same, and at the time of the construction of said dyke as aforesaid, of the fair, reasonable and market value of $30.00 per acre, or the sum of $1,422.10, and that the undivided one-half interest in said lands of this defendant was at said time of the value of $711.05.

Wherefore, defendant prays that it be adjudged that his interest in the said lands, at the time of taking by the petitioner, was of the value of $711.05, and that he have judgment against the petitioner therefore, together with interest thereon at the rate of six per cent per annum from June 14, 1935.

/s/ J. W. McCULLOCH
/s/ R. M. DUNCAN
Attorneys for Defendant. [73]

(Duly Verified by Gordon T. Carey.)

State of Oregon
County of Multnomah.—ss.

Service of the foregoing answer of Gordon T. Carey is hereby accepted this 22nd day of August, 1939, by receipt of a copy of said answer certified by John W. McCulloch, one of the attorneys for the defendant, Gordon T. Carey.

J. MASON DILLARD,
Assistant United States Attorney
One of Attorneys for Plaintiff.

[Endorsed]: Filed August 22, 1939. [74]

And Afterwards, to wit, on the 12th day of September, 1939, there was duly Filed in said Court, an Answer of William J. George et al. to Amended Petition, in words and figures as follows, to wit:

[75]

[Title of District Court and Cause.]

ANSWER TO PETITIONER'S AMENDED PETITION IN CONDEMNATION

Come now Stacey D. George, Betty George, William J. George, Edna George, Anna George Carey, Harry Carey, Eliza A. Shoemaker and E. P. Shoemaker, and for answer to the petitioner's amended petition in the above entitled cause, state as follows:

1.

Denies each and every allegation and statement made in Paragraphs I. to X., inclusive, of said amended petition, except as the same may be admitted or alleged in the further and separate answer herein.

2.

Denies that petitioner seeks to secure the title or possession of the lands mentioned in said amended petition for any of the purposes set forth in said amended petition, or for any purpose except as stated and alleged in the further and separate answer herein.

FURTHER AND SEPARATE ANSWER

The defendants, Stacey D. George, Betty George, William J. George, Edna George, Anna George Carey, Harry Carey, Eliza A. Shoemaker and E.

P. Shoemaker, for a further and separate answer to said Amended Petition, allege: [76]

I.

That they are the owners of an undivided 4/9 interest in the lands described in the amended petition as "The Mary A. George Tract (No. 16) as Lots 1, 2 and 3 of Section 1, and Lots 1, 2, 6, 7, 8 and 9 of Section 2, T. 26, S. R. 32, E.W.M. (North of Malheur Lake) in Harney County, Oregon, containing 177.38 acres more or less", the same being that part of said Lots above the Meander Line as run by John H. Neal in the year 1895.

II.

That said above described lands border upon the Meander Line of Malheur Lake for a distance of approximately two miles. That said lands, in the form of a narrow ridge, extend into the waters of Malheur Lake for a distance of approximately ¾ of a mile.

III.

That the said Malheur Lake is a noted place for ducks and other water fowl; many thousand of ducks and water fowl gather upon and feed at said Malheur Lake each year and particularly during the open or hunting season for such water fowl.

IV.

That there is a natural and much-used fly-way for water fowl over the tract of land above described, and particularly, over that part of said

tract in the ridge above mentioned which extends into the waters of said Malheur Lake.

V.

That for many years the United States Government, through its bureaus and departments, has been acquiring, securing and reserving lands in Harney County, Oregon, to be used as, and which are used as, a Bird Refuge; that no hunting is allowed on said Bird Refuge and the public is excluded therefrom; that said Bird Refuge now consists of about 150,000 acres of land in and about Malheur Lake, Harney Lake and Blitzen Valley. Said Bird Refuge includes substantially all the lands in that part of the State of Oregon near or served by, water; that the boundary line [77] of said Bird Refuge is more than 170 miles long and with very few exceptions is now fenced, and numerous trespass notices displayed thereon; that many thousands of ducks, geese and other water fowl annually use said 150,000-acres Bird Refuge.

VI.

That the land above described as the "Mary A. George Tract" is not within the said Bird Refuge, and has always been, up to the time the Government gained possession thereof by order of this Court, the most desirable and most noted hunting ground and duck-shooting ground in the State of Oregon; that due to the fact that such a large area is within said Bird Reserve, and due to the further fact that the said Bird Reserve can be approached

from private lands at very few places, and due to the further fact that the lands above described are the only privately owned lands which extend into the waters of said bird reserve, said lands above described are extremely desirable and valuable as hunting ground.

VII.

That the only purpose of the petitioner in obtaining possession of said premises in this proceeding was to prevent the shooting or taking of ducks or other wild fowl on said lands, and to deprive the owners of said lands of the right and privilige of using the said lands for hunting and duck-shooting purposes.

VIII.

That said lands have some value as agricultural and grazing lands, but that the highest and best use of said lands is, and always has been, its location and use as a hunting ground, and for that purpose, the said lands are of the reasonable market value of One Hundred ($100.00) Dollars per acre.

Wherefore, the defendants herein named pray that it be determined by this court that the reasonable market value of the premises described in the petition herein was, at the time the petitioner took possession thereof, and is now, the sum of $100.00 per acre, or a total value of $17,738.00; that defendants herein be decreed to have a 4/9 interest in said lands and be [78] given a judgment against the petitioner for the sum of $7,883.52, to-

gether with interest thereon at the rate of 6% per annum from June 14, 1935, until paid.

s/ J. W. McCULLOCH
s/ ROBT. M. DUNCAN
Attorneys for Defendants

(Duly Verified by William J. George.)

[Endorsed]: Filed September 12, 1939. [79]

And Afterwards, to wit, on the 20th day of September, 1939, there was duly Filed in said Court, a Motion of Gordon T. Carey for order for the payment of money, in words and figures as follows, to wit: [80]

In the District Court of the United States
For the District of Oregon
No. L-12492

IN THE MATTER OF THE ACQUISITION BY THE UNITED STATES OF AMERICA OF 3474.34 ACRES, MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON

MOTION OF GORDON T. CAREY FOR ORDER TO PAY MONEY ON DEPOSIT

To the Honorable Judges of the United States District Court for the District of Oregon:

Comes now Gordon T. Carey, by J. W. McCulloch and R. M. Duncan, his attorneys, and respectfully shows, as follows:

I.

That by petition for condemnation, declaration of taking, and payment of estimated award into the registry of this Court, the United States of America, on the 14th day of June, 1935, took title to the Gordon T. Carey tract of land (No. 31-A) described as Lots Eight (8) and Ten (10) and the west Half (W½) of Lot Five (5), Section Nineteen (19), Township Twenty-five (25) South, Range Thirty-three (33) E.W.M. in Harney County, Oregon, containing 46.67 acres, more or less, of land, estimated value at $326.69.

II.

That by Paragraph VIII of the amended petition filed in said cause on the 27th day of January, 1937, the United States of America, the petitioner herein, filed an amended petition for condemnation in said cause in which it was stated in Paragraph VIII of said amended petition, as follows:

> "The property sought to be acquired does not include any right which the defendant may have, or claim, as appurtenant to the said lands and those riparian thereto, and it does not include any right, title, interest or estate of the defendant to lands or waters inside the Neal survey lines, claimed by defendant to be meander lines of 'Malheur Lake', as shown by and in accordance with the official plats of said Township 26 South, Range 32 E.W.M., as approved by the General Land Office and on file with the [81] Surveyor General; and

it does not include any lands claimed to be relicted lands within the Malheur Lake Division, as described in the United State Supreme Court decree dated June 3, 1935, in re. United States v. Oregon, recorded in Book 36, page 546, Harney County, Oregon records."

III.

That at the time of the taking by the United States, the said Gordon T. Carey was the owner of, and now is the owner of an undivided one-half interest in said tract. That the said defendant has filed an answer in said condemnation proceeding in which answer he denies that the amount deposited in the registry of the Court is a fair or just award for said lands so taken by the United States, and by such answer, said defendant has made demand for the amount such defendant claims is the reasonable value of said premises. That the said defendant desires to withdraw from the registry of the Court the amount so deposited by the Court, as herein stated, said amount to be applied on whatever amount is awarded said defendant in said condemnation proceeding.

That based upon the foreging statement of facts, this Honorable Court is requested to make an order directing the Clerk of the United States District Court for the District of Oregon to make payment of the funds now deposited in the registry of this Court, to the said Gordon T. Carey, as follows:

Pay to the said Gordon T. Carey one-half the sum of $326.69, or $163.34.

J. W. McCULLOCH
R. M. DUNCAN
Attorneys for Defendant Gordon T. Carey

Please take notice that the foregoing motion will be on call of the motion calendar of the court, Monday, Oct. 2, 1939.

J. W. McCULLOCH,
of Attorneys for Defendants.

[Endorsed]: Filed September 20, 1939. [82]

And Afterwards, to wit, on the 20th day of September, 1939, there was duly Filed in said Court, a Motion of William J. George, et al. for an order for the payment of money, in words and figures as follows, to wit: [83]

[Title of District Court and Cause.]

MOTION OF WILLIAM J. GEORGE ET AL., FOR ORDER TO PAY MONEY ON DEPOSIT

To the Honorable Judge of the United States District Court for the District of Oregon:

Comes now William J. George and Edna George, his wife; Anna George Carey and Harry A. Carey, her husband; Eliza O. George Shoemaker and E. O. Shoemaker, her husband; Stacey D. George and Betty M. George, his wife, by J. W. McCulloch and

R. M. Duncan, their attorneys, and respectfully show as follows:

I.

By the petition for condemnation, Declaration of Taking, and payment of estimated award into the registry of this Court, the United States of America, on June 14, 1935, took title to the Mary A. George Tract (No. 16), containing 177.38 acres, more or less, of patented land in Harney County, Oregon, consisting of Lots One (1), Two (2) and Three (3) in Section One (1); Lots One (1), Two (2), Six (6), Seven (7), Eight (8) and Nine (9) in Section Two (2), Township Twenty-six (26), Range Thirty-two (32), E.W.M. (N.M.L.), together with all the rights of water thereunto appertaining.

II.

That on the 27th day of January, 1937, the United States of America, the petitioner in said condemnation proceeding, filed an amended petition for condemnation in said cause, in which it is stated in Paragraph IX of said amended petition, among other things, as follows:

> "There has been filed in said original proceeding, by L. A. Liljeqvist, Equire, their solicitor, a motion on behalf of William J. George, Edna George, his wife; Anna [84] George Carey and Harry A. Carey, her husband; Eliza O. George Shoemaker and E. O. Shoemaker, her husband; Stacey D. George and Betty, George, his wife, with reference to an undivided interest in the said Mary A. George tract (No. 16).

"The said defendants so represented by L. A. Liljeqvist, Equire, their solicitor, are made defendants in this separate supplemental and amended petition. The purpose of said motion was to require the United States of America to specify what additional lands were intended to be acquired other than Lots 1, 2 and 3, Sec. 1, and Lots 1, 2, 6, 7, 8 and 9, Sec. 2, T. 26, S.R. 32, E.W.M. (N.M.L.), containing 177.38 acres. There has been deposited in the registry of the United States District Court for the District of Oregon, the sum of Two Thousand One Hundred and Twenty-eight Dollars and Fifty-six cents ($2,128.56), that being the estimated award for the said Mary A. George tract (No. 16), as set forth in a declaration of taking filed herein. A portion of this estimated award so paid into Court has been withdrawn upon application of the heirs of Mary A. George and Adam F. B. George, both deceased, but there remains on deposit in the Registry of this Court, a portion thereof to cover the right, title, claim and interest of the remainder of said heirs, which estimated award as to their undivided interest, may be withdrawn, by the defendants hereto, upon application to and order by the United States District Court under the provisions of the Declaration of Taking Act (46 Stat. 1421), without prejudice to any claim that the said defendants may desire to make for more money than the said estimated award for said tract, and also without prejudice to any

claim that they may desire to make as to ownership within the said Malheur Lake Division lying adjacent to the said Mary A. George tract (No. 16)"

III.

That at the time of said taking by the United States the said William J. George and Edna George, his wife, were the owners of an undivided one-ninth interest in said tract of land; that at said time Anna George Carey and Harry A. Carey, her husband, were the owners of an undivided one-ninth interest in said tract; that Eliza O. George Shoemaker and E. O. Shoemaker, her husband, were at said time the owners of an undivided one-ninth interest in said tract, and that at said time Stacey D. George and Betty George, his wife, were the owners of an undivided one-ninth interest in said tract.

IV.

That the said parties have filed an answer in said condemnation proceeding, in which answer they deny that the amount deposited in the Registry of the Court is a fair or just award for [85] said lands so taken by the United States, and by such answer said parties have made a demand for the amount such parties claim is the reasonable value of said premises. That the parties herein desire to withdraw from the Registry of the Court, the amount so deposited by the Court as heretofore stated, said amount to be applied on whatever amount is awarded to said parties in said condemnation proceeding.

That based upon the foregoing statement of facts,

this Honorable Court is requested to make an order directing the Clerk of the United States District Court for the District of Oregon, to make payment of the funds now deposited in the Registry of this Court in this cause in the following manner:

(1) Pay to William J. George and Edna George one-ninth of $2,128.56, or $236.50;

(2) Pay to the said Anna George Carey and Harry A. Carey, the sum of $236.50;

(3) Pay to the said Eliza O. George Shoemaker and E. O. Shoemaker the sum of $236.50; and,

(4) Pay to the said Stacey D. George and Betty George the sum of $236.50.

J. W. McCULLOCH
R. M. DUNCAN
Attorneys for the defendants William J. George, Edna George, Anna George Carey, Harry A. Carey, Eliza O. George Shoemaker, E. O. Shoemaker, Stacey D. George and Betty M. George.

Please take notice that the foregoing motion will be on call of the motion calendar of the court, Monday, Oct. 2, 1939.

J. W. McCULLOCH
of Attorneys for Defendants.

[Endorsed]: Filed September 20, 1939. [86]

And Afterwards, to wit, on the 4th day of December, 1940, there was duly Filed in said Court, a Motion of William J. George, et al. to vacate judgment on declaration of taking and to dismiss, in words and figures as follows, to wit: [87]

[Title of District Court and Cause.]

MOTION TO VACATE JUDGMENT ON DECLARATION OF TAKING AND FOR DISMISSAL OF PETITION.

Come now William J. George, Anna Carey and Eliza O. Shoemaker, the owners of an undivided three-ninth's interest in "The Mary A. George Tract (No. 16)", and comes now Gordon T. Carey, the owner of an undivided one-half interest in Tract (No. 31-A), (said tracts above mentioned being so designated and described in the Petition filed in said cause June 14, 1935) by J. W. McCulloch and Edwin D. Hicks, their Attorneys, and move the court for an order, judgment and decree as follows:

For an Order, Judgment and Decree annulling, vacating and setting aside the pretended order and judgment of this court in the above entitled cause, made and entered June 14, 1935, in which pretended order and judgment the court attempted to transfer to the United States, the title to a large tract of land in Harney County, Oregon, including the lands of these moving parties.

The said moving parties herein further move this

court for an order and judgment dismissing said petition so filed June 14th, 1935.

The motions, as hereinabove stated, are made on the ground that the petition in said cause does not state sufficient [88] facts to constitute a cause of action, and that the said petition does not state sufficient facts to give the court jurisdiction to make the pretended order and judgment of taking, and that by reason thereof the court was and is without jurisdiction in said cause.

This motion is based upon the records and files in this cause, which are particularly referred to in our brief filed herewith, in support of this motion.

J. W. McCULLOCH
EDWIN D. HICKS
Attorneys for William J. George, Anna Carey, Eliza O. Shoemaker, and Gordon T. Carey.

To the United States Attorney:

Notice is hereby given that on Monday, December 23rd, 1940, at the hour of 10:00 o'clock A.M., the foregoing Motion will be presented to the court for its consideration.

J. W. McCULLOCH
EDWIN D. HICKS
Attorneys for Motion.

State of Oregon,
County of Multnomah.—ss.

Due service of the within Motion to vacate judgment is hereby accepted in Multnomah County, Oregon, this 4th day of December, 1940, by receiving a

copy thereof, duly certified to as such by Edwin D. Hicks, of attorneys for Motion.

J. MASON DILLARD,
of Attorneys for Petitioner.

[Endorsed]: Filed December 4, 1940. [89]

And Afterwards, to wit, on Monday, the 28th day of September, 1942, the same being the 72nd Judicial day of the Regular July, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [90]

In the District Court of the United States
For the District of Oregon
No. L-12492

UNITED STATES OF AMERICA,
Petitioner,

vs.

3474.34 ACRES, MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON; HARNEY COUNTY, ET AL,
Defendants.

ORDER VACATING JUDGMENT AND DECLARATION OF TAKING

At this time, this matter coming on to be heard on the motion of William J. George, Anna Carey, Eliza O. Shoemaker and Gordon T. Carey, for an order and judgment of this court dismissing the

petition and vacating the declaration of taking and the judgment of this court entered in the within entitled cause on the 14th day of June, 1935; said moving parties appearing by J. W. McCulloch and Edwin D. Hicks, their attorneys, and United States of America appearing by Carl C. Donaugh, United States Attorney, and J. Mason Dillard, Assistant United States Attorney; and the court having thoroughly considered the questions raised in respect to said motion, and being fully informed in the premises; and it appearing to the court that said declaration of taking and the judgment and decree entered herein as aforesaid should be in all things set aside, vacated and held for naught; now therefore, it is

Ordered and Adjudged: that the judgment on declaration of taking, of this court entered in the within cause on the 14th day of June, 1935, be, and the same is hereby vacated, set aside and held for naught in its entirety, and such order and judgment is annulled; [91] and it is likewise

Ordered and Adjudged: that the declaration of taking filed in this proceeding be, and the same is hereby stricken from the files of this court; and it is further

Ordered and Adjudged: that the complaint and/or petition in the within cause be, and the same is hereby dismissed.

Dated this 28th day September, 1942.

JAMES ALGER FEE,
U. S. District Judge

[Endorsed]: Filed October 5, 1942. [92]

And Afterwards, to wit, on the 26th day of December, 1942, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [93]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: William J. George, Anna Carey and Eliza O. Shoemaker, and to J. W. McCulloch and Edwin D. Hicks, their attorneys:

You and each of you will take notice that the plaintiff, United States of America, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain order and judgment entered in the above-entitled cause and court and signed by the Honorable James Alger Fee, one of the judges of said District Court, on the 28th day of September, 1942, which judgment is to the effect that the petition for condemnation herein be dismissed and the judgment on the declaration of taking be vacated.

Dated at Portland, Oregon, this 26th day of December, 1942.

CARL C. DONAUGH
United States Attorney for the
District of Oregon
J. MASON DILLARD
Assistant United States
Attorney

[Endorsed]: Filed December 26, 1942. [94]

And Afterwards, to wit, on the 25th day of January, 1943, there was duly Filed in said Court, a Designation of Contents of Record in words and figures as follows, to wit: [95]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To: G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon:

Petitioner herein designates the entire record in the above-entitled cause as the record on appeal in the Circuit Court of Appeals for the Ninth Circuit.

Dated at Portland, Oregon, this 25th day of January, 1943.

CARL C. DONAUGH
United States Attorney for the District of Oregon

J. MASON DILLARD
Assistant United States Attorney

United States of America,
District of Oregon,—ss.

Service of the within Designation of Record is accepted in the State and District of Oregon, this 25th day of January, 1943, by receiving a copy thereof, duly certified to as such by J. Mason Dillard, Assistant United States Attorney for the District of Oregon.

EDWIN HICKS
Of Attorneys for Defendants.

[Endorsed]: Filed January 25, 1943. [96]

And Afterwards, to wit, on the 2nd day of February, 1943, there was duly Filed in said Court, a Transcript of proceedings before the Court on September 28, 1942, in words and figures as follows, to wit: [97]

[Title of District Court and Cause.]

Portland, Oregon, Monday, Sept. 28, 1942.
2:15 o'clock P.M.

Before:

Honorable James Alger Fee, Judge.

Appearances:

Mr. J. Mason Dillard, Assistant United States Attorney, appearing for the plaintiff United States of America.

Messrs. Edwin D. Hicks and J. W. McCulloch, attorneys for defendants William J. George, Anna Carey, Eliza O. Shoemaker and Gordon T. Carey.

TRANSCRIPT OF PROCEEDINGS

(During the calendar call on the above date the following occurred in regard to the above entitled cause:)

The Court: No. 12492, United States vs. 3474.34 acres of land in Harney County.

Mr. Dillard: It is my understanding, your Honor, there are about two properties or tracts represented by Mr. McCulloch which have not been disposed of, and it is my recollection that along in the Pendleton term of 1940, I think—I don't know whether it was '41 or '40—they were set for trial and taken off

on the representations of the defendants that they were not able to meet the expense of the trial. The proceeding has [99] never been fully closed. What counsel desire to do about the interests there I don't know. A deposit was made in court and a declaration of taking filed and title acquired by the Government as a result of that. That is my understanding about the status of this case.

Mr. Hicks: The case is a little bit complicated, your Honor, in respect to the suggestion that it be dismissed at this time unless some provision be made in respect to that decree. The case was filed on the 14th of June, 1935, over seven years ago, and at that time a declaration of taking was filed, and I believe the decree was entered as of the same date vesting title in fee simple to all of this land in the United States, and many of the parties did draw down that money that was deposited. But the decree covers land in respect to which the owners have received nothing at all, and the title to that land, as well as all of the land that we are concerned with here, is now under this decree vested in the United States. The result is that as the matter now stands and as it has stood for seven years these owners have had nothing except a decree against them vesting title in the Government and have drawn down no money. That is true as to a number of people or owners.

I might say this, your Honor: While I don't represent all of those people—I think there are three or four that Mr. McCulloch represents that I am helping with—the fact remains that that is the situa-

tion. If the case were dismissed now, of course, the owners might be confronted with the necessity of filing suit against the Government to obtain the vacation of that decree, or the matter might be complicated in some way through a dismissal of the case as such without making provision for vacation of the decree. Now what form it should take I don't know, but I just point out to your Honor that certainly if the case is dismissed some provision should be made to vacate the decree as to these parties in respect to whom the land has been taken by the Government without any compensation or without any suggestion of so doing.

Mr. Dillard: May I ask a question? It has been my impression that you and Mr. McCulloch had represented all of the remaining outstanding properties against us. [100]

Mr. Hicks: Mr. McCulloch will know about that. I know of I think four people, your Honor, who have not drawn down any of this money that was deposited in court. But as I conceive this condemnation proceeding the mere fact that a person draws down the money would not foreclose him of his rights to have his land litigated, and so forth, and that is what I am thinking of here. Now as to many of those people we do not represent them and we are not entitled to speak for them, but we do represent these four and possibly others. Mr. McCulloch would know. Does that answer your question?

Mr. Dillard: I want to know, if there are some you do not represent, who are they?

Mr. Hicks: Well, I think we represent only four of the owners who own land described in the complaint.

Mr. McCulloch: There are four tracts of land.

Mr. Hicks: Four different tracts of land. Of course, this is true, too, your Honor: It is our information that a number of people have given quitclaim deeds to the Government in respect to some of the land that is described there in the complaint, and of course as to it they would be covered. They would not be prejudiced or no harm would be done by this dismissal as to them. But that other situation is apparent there, and it would occur to me that, as regards all of these parties, they should have a chance to come in or what not and be heard because they have simply drawn down that money. Our people haven't. They would still be entitled to have the question adjudicated as to the value of the land.

Mr. Dillard: If your Honor please, if I am informed, the outstanding interests represented by Mr. McCulloch, the issues regarding those properties were set for trial and Mr. McCulloch represented his clients were unable to stand the expense of preparing for such a trial, and as a result it went off, I suppose pending what would become of the other case, and that is the way it has remained. Those owners who did not get their money did not get it, as I understand it, because they were not satisfied with the award made by the Government and still were not able, for one reason or another, to come into court. [101]

Mr. Hicks: An examination of the file will reveal that there is a motion pending there for dismissal of the case on certain grounds and likewise a motion for vacation of the decree, and I think that that motion is still pending and I don't believe it has ever been passed on, your Honor. Some suggestion was made that briefs should be filed at one time, but it was just sort of passed over, as I remember it, and I believe that the case is pending on that motion. I may be mistaken about it.

Mr. McCulloch: I will state my views about this case. I take this position—I can say what I think all right, but I cannot hear what the Court says to me, and if you have any remarks to make Mr. Hicks will hear them and translate them to me and I can probably answer the Court's question. This case now under consideration was filed in this court on the 14th day of June, 1935. It calls itself a suit for condemnation of lands. There are no parties defendant in the suit at all. The 3474 acres of land appear to be the defendants. A number of parties are described in the petition as owning these different tracts of land, and on the same day, June 14, 1935, there was filed in this court what is designated as a declaration of taking by the Secretary of Agriculture or some Assistant Secretary of Agriculture declaring that he is taking all of these lands under certain laws. At the same date the Court entered a decree and judgment in the case and recited the facts, and the last paragraph of that decree reads as follows: "It is Further Adjudged, Ordered and Decreed that the possession of

the above described property shall be delivered to the United States of America on or before the 15th of July, 1935." Then it says "and that this cause is held open for such other and further order, judgment or decree as is necessary in the premises." That is the last paragraph of the decree. The decree prior to that had designated that upon the filing of declaration of taking the fee simple title of the property left the defendants—if you call them defendants—left the land owners and vested in the Government at two o'clock P.M. on June 14th, 1935. Now that order and decree still stands. The lands of our clients were taken away from them on that date, and it has been out of their possession ever since. That decree is still in force and effect. [102]

Now we have filed a motion asking for two specific orders from the Court. One is that we are attacking the sufficiency of the petition as stating any cause of action at all, and we are asking that it be dismissed. The second is that we are asking that the Court enter an order or judgment or decree voiding this pretended order which was made on June 14th. These motions were filed something like two years ago. They were argued before this Court on the 2nd day of January of 1941, and they have been pending since. We fully explained our position at that time, and I think we made it clear that there is no valid petition for the taking of lands and nothing upon which a decree can be based. And, that being so, we say that the petition should be dismissed and that an order of the Court should be made annulling that decree. The decree itself keeps it

open for that very purpose or for some other purpose. It says it shall remain open for such other and further order or decree as the Court may see fit to make.

Now that briefly is our statement of this case. If there is any other angle to it that the Court would like to have me explain, I believe I understand all the different angles of the case. Counsel said something about the Otley case. There is no connection or relation between this case and the Otley case. The Otley case was a suit brought by the Government a considerable time later, and was for the purpose, as they at that time said, to quiet title to lands in the lake bed. The Circuit Court of Appeals said it was a suit to set aside certain patents that had theretofore been issued to lake beds. These lands do not have anything to do with the lake bed. They are taking patented lands above the meander line.

The Court: Has Washington said what they want to do with this case?

Mr. Dillard: No, your Honor, they have not. I did not mean to intimate any close relationship between it and the Otley case, but the only word I got on it was with regard to the Otley case, and that was the word that I conveyed to your Honor and to counsel last Monday.

The Court: Well, do you really want the case dismissed or what do you want done with it? [103]

Mr. Hicks: If the case could be dismissed, your Honor, so that the prayer of the motion would be granted and so these people would not be holding

their land with the Government holding a decree vesting title in it at the same time, we would have no objection to the dismissal of the case. Our only concern is to see that they have not been divested of their title and their rights without having received any compensation for it whatsoever. Of course, the Government has held that land for seven years. Whether they would want to ask later for some compensation for holding that land I don't know. None such is contemplated now, but they probably would not want to be foreclosed of their rights to raise that question at the proper time. But we have no objection to dismissal as long as their rights are saved and the record is not clouded, or, rather, the title is not clouded.

Mr. Dillard: It seems to me, your Honor, that there is considerable confusion will result from an out and out dismissal of it. I think counsel can speak in the interests of their people probably better than anybody else, but it is my recollection—I was not participating in this at the outset, but my recollection is that with only one or two exceptions the land owners agreed to the price deposited in court and accepted it and gave deeds of confirmation, as Mr. Hicks mentioned. Now whether their parties did right at this minute I can't tell. Probably counsel can. At this minute I am under the impression that these defendants here did give deeds of confirmation. Maybe I am mistaken.

Mr. McCulloch: None of them; none of them.

Mr. Dillard: They did not. All right; then I am mistaken about that. But as to other parties

there were deeds given. I recall in connection with the setting of the case at one time representation was made that the amount involved was not sufficient to warrant the expense on the part of the defendants, and one thing and another. I don't know that it would be possible, but possibly the thing could be best wound up by letting the defendants produce their testimony by deposition and clean it up that way as it was originally commenced, unless they want to take the position that they absolutely do not want to part with the lands in any proceeding. I [104] don't understand that they have been taking that position. As I recall it, their position was they were unable financially to properly defend the case and to present the evidence of values they wanted to present.

The Court: Of course, Mr. McCulloch says it has no relation to the other case. It does have a relation to the other case; it always has had a relation. I wouldn't have kept it on the docket this long if it hadn't had a relation to the other case. That is what it was kept here for. The assumption of the Court was that the decree in the Malheur Lake case would furnish a basis of settlement for all these cases. And now, since we have gotten that far, the Government just stops and doesn't do anything. I think that the most expeditious way to dispose of this case is to set it for trial, hold the motions in abeyance and set it for trial. If the Government doesn't show up, why, then I will give notice at that time that I will set aside the decree if they do not appear here. I think we can penalize them

in that way without getting in any further trouble.

Mr. Hicks: Would the Court rule on that motion in advance of setting for trial? My only thought is if the Court ruled a certain way in respect to that motion it might avoid the necessity of bringing witnesses here and going to trial preparation, and so forth.

The Court: Well, you know what is going to happen. The Government is not going to be here. At least I know that. We will find out beforehand—Mr. Dillard's office, of course, will try to be ready for trial and we may get some action from the Interior Department. I would much rather not put the Government in a place where they have to have that decree set aside upon the basis that you have alleged in your brief unless we have to, but if it becomes necessary, why, I will take that up at that time and I would like to have a representative of the Interior Department here.

Mr. Hicks: My inquiry was this, your Honor: If the Court is going to set the case down for trial at a certain time should we be prepared with our witnesses to show values?

The Court: Mr. Dillard, do you think if it is set down for a tentative date for trial you will get any action from Washington? [105]

Mr. Dillard: The only action that I can see is that of course we would have to be ready for trial. Is that what your Honor has in mind?

The Court: I want to know what they want to do. I haven't been able to find out for many years now what the department expects to do with this case.

Mr. Dillard: I understand they want the land. That is why they filed on it. That is all. That is my only understanding about that. There is no change of policy in respect to that that I know of. I have never seen anything to indicate that.

The Court: I was told by Mr. Biggs, who filed this case, that apparently the Government would like to abandon these proceedings at the present time. That was informal, so I am not sure that that is true, but that was his idea in one of our conferences, that they might want to abandon this thing.

Mr. Dillard: Well, I don't recall that. As to these particular tracts? Is that what he meant, as to these particular tracts?

The Court: The whole thing. Since the Malheur case did not work out they would like to quit.

Mr. Dillard: Well, I don't recall that at all.

The Court: Well, I don't think that that is a good solution, apparently. I don't seem to get anywhere with that. So I am just going to dismiss the case and set aside the decree right now. If they want to start another one, why, all right. I now sustain the motion for the defendants in the case and set aside the former decree, set aside the land taken by the Government, and dismiss the case. You may enter an appropriate order.

Mr. Hicks: So I may be clear, I assume your Honor wants us to draw the order?

The Court: Yes.

Mr. Hicks: We are just vacating the entire decree and everything in respect to it?

The Court: Yes.

Mr. Hicks: It will go right back where it was started from?

The Court: Yes. [106]

Mr. Dillard: Now may I inquire is that sustaining the motion to dismiss as to their particular clients and land owners?

The Court: No, I think it affects the whole decree.

Mr. Dillard: Just so I understand your Honor's intent—vacating the whole decree?

The Court: I am going to find out what is happening in this case. I will just dismiss it and then maybe something will happen. I haven't been able to get anything done for seven years. I don't know whether it is properly founded or not. I will probably be reversed in it, but I am willing to take that chance.

Mr. Dillard: Vacating the original order and decree based on the declaration of taking?

The Court: Yes, vacating the declaration of taking and the decree based on the declaration of taking.

(Thereupon proceedings relative to the above matter on said September 28, 1942, were concluded.) [107]

[Title of District Court and Cause.]

I, John S. Beckwith, hereby certify that I reported in shorthand the proceedings had in the above entitled cause on Monday, September 28, 1942, and thereafter prepared a typewritten transcript from my shorthand notes so taken, and the foregoing and attached 13 pages, numbered 1 to 13, both inclusive,

contain a full, true and correct record of all the oral proceedings had upon said hearing in said cause.

Dated at Portland, Oregon, this 16th day of November, 1942.

s/ JOHN S. BECKWITH
Reporter.

[Endorsed]: Filed Feb. 2, 1943. [108]

And afterwards, to wit, on the 4th day of March, 1943, there was duly Filed in said Court, an amended designation of contents of Record, in words and figures as follows, to wit: [111]

[Title of District Court and Cause.]

AMENDED DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The United States of America, appellant in the above entitled case, designates the following portions of the record to be contained in the record on appeal:

Filed

1. Petition, June 14, 1935.
2. Declaration of Taking, June 14, 1935.
3. Judgment on Declaration of Taking, June 14, 1935
4. Supplemental Petition, July 19, 1935.
5. Motion of Gordon T. Carey, et al., to make more definite, September 9, 1935.

6. Order of Severance as to Gordon T. Carey, et al., January 25, 1937.

7. Order of Severance as to William J. George et al., January 25, 1937.

8. Amended Petition for Condemnation as to Gordon T. Carey, January 27, 1937.

9. Amended Petitions for Condemnation as to William J. George et al., January 27, 1937. [112]

10. Petition of Stacy George and Betty George for payment of money on deposit, March 9, 1939.

11. Order to Pay Stacy George and Betty George money on deposit, March 9, 1939.

12. Answer of Gordon T. Carey to an Amended Petition, August 22, 1939.

13. Answer of Stacy D. George et al., September 12, 1939.

14. Motion of Gordon T. Carey for Order to pay money on deposit, September 20, 1939.

15. Motion of William J. George et al. for Order to pay money on deposit, September 20, 1939.

16. Motion of William J. George, et al., to Vacate Judgment on Declaration of Taking and for Dismissal of Petition, December 4, 1940.

17. Transcript of Proceedings on Motion to Vacate Judgment on Declaration of Taking and to Dismiss Petition, September 28, 1942.

18. Order Setting Aside and Vacating Judgment on Declaration of Taking, and Dismissing Petition, September 28, 1942.

19. Certified copy of docket entries, omitting names of defendants, February, 1943.

20. Certificate of Clerk of District Court as to

amount of deposit under declaration of taking now remaining in court, February, 1943.

21. Affidavit as to the cause of postponement of April 2, 1940, February, 1943.

22. Notice of Appeal, December, 1942.

23. Designation of contents of record on appeal, January 25, 1943.

24. Stipulation agreeing to amended designation, February, 1943.

25. This amended designation, February, 1943.

Respectfully submitted,

CARL C. DONAUGH,

United States Attorney [113]

Service of the within Amended Designation of Contents of Record on Appeal is hereby accepted at Portland, Oregon, this 4th day of March, 1943.

EDWIN D. HICKS.

[Endorsed]: Filed March 4, 1943. [114]

And afterwards, to wit, on the 6th day of April, 1943, there was duly Filed in said Court, an Affidavit of J. Mason Dillard, in words and figures as follows, to wit: [115]

[Title of District Court and Cause.]

AFFIDAVIT AS TO CAUSE OF POSTPONEMENT

State of Oregon,
County of Multnomah—ss.

I, J. Mason Dillard, being first duly sworn, depose and say:

That at all time material to this cause I have been an Assistant United States Attorney for the District of Oregon and have been one of the attorney representing the Government in this proceeding;

That the records of the United States District Court for the District of Oregon reveal that this cause was held in abeyance for a long period of time without trial, for the reason that the same was related to an equity suit pending in that court—that is, United States vs. Henry Otley, et al;

That on the 28th day of September, 1942, the Honorable District Court for the District of Oregon made an order dismissing this action and setting aside the judgment on the declaration of taking which had theretofore been made;

That examination of the record in this cause indicates that said cause was set for trial at the Pendleton Term of the United States District Court for the District of Oregon, commencing in April of 1941; that I am apprehensive that the records of

the court do not completely reveal the circumstances and conditions under which the case was not then tried; that to the best of my recollection and belief the circumstances were as follows: [116]

That prior to the commencement of said term the Court notified the parties that the case would be set for trial; that the United States was at all times prepared for trial and made no objection to the Court regarding the proposed date thereof; that prior to the commencement of said court term, and in Portland, Oregon, counsel for the defendants advised that the defendants involved were not financially able to prepare their case and consequently could not engage in the trial of the same at the Pendleton term; that, to the best of my knowledge and belief, no formal representation was made by the defendants to the Court regarding these things and no formal motion to postpone the case was made on their behalf; that the case remained on the docket and was called at the commencement of the term of court, but by that time it was fully known and understood between the Court and the parties that the same could not be tried, and thereupon the Court requested of the United States Attorney a showing of some kind in writing why the case should be removed from the trial docket; that the defendants and their counsel were not in attendance upon the court, and therefore no request for such showing was made upon them; that thereupon I prepared the showing affidavit regarding the postponement of the trial, which was entered of record in this cause on or about the 5th of April, 1941;

That said showing was made at the request of the

Court, and I am now apprehensive that it may be misinterpreted as a formal application for postponement of the cause made on behalf of the Government; that it is my information and belief that at the time said showing was made all of the parties hereto and the Court were fully advised that the reason for the postponement of the cause was the representations by the defendants of their inability to be prepared for trial; [117]

That I make this affidavit for the record on appeal in this cause for the purpose of clarifying the meaning of the records of the United States District Court in the respects herein mentioned.

J. MASON DILLARD
Assistant United States
Attorney

Subscribed and sworn to before me this 2nd day of February, 1943.

WILLIAM H. HEDLUND
[Seal] Notary Public for Oregon
My commission expires:

United States of America,
District of Oregon—ss.

Service of the within Affidavit is accepted in the State and District of Oregon this 6th day of March, 1943, by receiving a copy thereof, duly certified to as such by J. Mason Dillard Assistant United States Attorney for the District of Oregon.

J. W. McCulloch
Of Attorneys for
Defendants.

[Endorsed]: March 6, 1943. [118]

And Afterwards, to wit, on the 23rd day of March, 1943, there was duly Filed in said Court, a Stipulation as to record on appeal in words and figures as follows, to wit: [119]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

It Is Hereby Stipulated by and between the parties hereto, by and through their respective counsel, that the transcript of record to be certified to the United States Circuit Court of Appeals for the Ninth Circuit in the appeal of the above-entitled cause shall be in accordance with the Amended Designation of Record filed by the petitioner herein.

Dated at Portland, Oregon, this 23d day of March, 1943.

CARL C. DONAUGH
United States Attorney for the District of Oregon
J. MASON DILLARD
Assistant United States Attorney
Attorneys for Petitioner
J. W. McCULLOCH
Of Attorney for Defendants

[Endorsed]: Filed March 23, 1943. [120]

TRANSCRIPT OF DOCKET ENTRIES

in words and figures as follows, to wit: [123]

Filings—Proceedings

1935

June 14 Filed Petition for condemnation of land.

June 14 Filed Declaration of Taking.

June 14 Filed & entered judgment on declaration of taking.

July 15 Filed praecipe U. S. Atty. for copy declaration of taking, judgment, furnished.

July 19 Entered order allow petitioner to file supplemental petition.

July 19 Filed supplement to petition for condemnation.

August 7 Filed praecipe of U. S. Atty. for Summons.

August 7 Issued Summons—handed to U. S. Atty.

September 9 Filed motion of Gordon T. Carey et al to strike.

September 9 Filed motion of Gordon T. Carey et al to make more definite.

September 10 Filed Answer of Myrtle Caldwell, et al.

August 30 Filed praecipe U. S. Atty. for copies, furnished.

September 13 Filed motion of Deft. Dunn to make petition more definite and certain.

September 12 Filed stipulation for time to October 1 for Harney County to plead.

September 24 Filed claim of State of Oregon.

September 27 Filed Summons with Marshal's return of service.

September 26 Filed stipulation for time for defts to plead.

October 3 Entered order permitting Jesse L. Brightwell to appear of counsel for plaintiff.

October 4 Filed & entered order for payment of Walla Creasman et al.

October 4 Filed petition for payment of Walla Creasman et al.

October 4 Filed petition for payment of Henry L. Bechtel.

October 4 Filed & entered order for payment of Henry L. Bechtel.

October 4 Filed petition for payment of Lavina Griffin et al.

October 4 Filed & entered order for payment of Lavina Griffin et al.

October 4 Filed petition for payment of Leona Creasman.

October 4 Filed & entered order for payment of Leona Creasman.

October 4 Filed petition for payment of W. J. Clarke.

October 4 Filed & entered order for payment of W. J. Clarke.

October 4 Filed petition for payment of James Thompson.

October 4 Filed & entered order for payment of James Thompson.

October 12 Filed petition for payment of Geo. T. McGrath et al.

October 12 Filed & entered order for payment of Geo. T. McGrath et al.

October 12 Filed petition for payment of Minnie Wooley.

October 12 Filed & entered order for payment of Minnie Wooley.

October 12 Filed petition for payment of Maggie C. Catterson.

October 12 Filed & entered order for payment of Maggie C. Catterson.

October 14 Filed affidavit of Edw. D. Hicks.

October 14 Filed affidavit of Jesse L. Brightwell.

October 14 Filed and entered order for non resident defts. to appear and plead and for publication.

October 14 Filed praecipe U. S. Atty. for certfd. copies of order Oct. 14, furnished.

October 17 Filed receipts of Leona Creason, Walter Creason, Mrs. Marguerite Grout, Mrs. Marguerite Grout as guardian, Lavina Griffin, Henry L. Bechtel, W. J. Clark, William R. Harris, James Thompson, Rose E. McGrath, et al.

October 18 Filed affidavit of mailing.

October 19 Filed Receipt of Minnie Wooley, Maggie C. Catterson.

October 25 Filed Receipt of Mrs. Edith Steele.

November 15 Entered order fixing Dec. 16 for hearing on motions.

November 18 Filed petition of Annie Hamilton.

November 18 Filed and entered order for payment of Annie Hamilton.

November 18 Filed petition for payment of Emma A. M. Waterman.

November 18 Filed & entered order for payment of Emma A. M. Waterman.

November 21 Filed receipts of C. R. Bennett, Trustee.

November 23 Filed receipts of Annie Hamilton.

November 26 Filed receipts of Emma A. M. Waterman.

November 25 Filed petition for payment of Mary Alice Simmons.

November 25 Filed & entered order for payment of Mary Alice Simmons.

December 11 Filed demurrer of Jim Gibson to petition for condemnation.

December 18 Filed stipulation to dismiss as to Jim Gibson.

December 18 Filed & entered order dismissing as to Jim Gibson.

December 20 Filed petition for payment of Guy L. Hembree.

December 20 Filed & entered order for payment of Guy L. Hembree.

December 20 Filed petition for payment of John L. Hembree.

December 20 Filed & entered order for payment of John L. Hembree.

December 20 Filed Petition for payment of Georgia E. George et al.

December 20 Filed & entered order for payment of Georgia E. George et al.

December 20 Filed affidavit of publication. [126]

December 24 Filed reply of U. S. to Answer of Myrtle Caldwell et al.

December 28 Filed receipt of Guy L. Hembree.

December 28 Filed receipt of Georgia E. George et al.

1936

January 6 Filed motion of U. S. Atty. for order of severance.

January 13 Record of hearing on motion of plaintiff for severance & for leave to file amended petition.

January 13 Filed defendant Thos. T. Dunn's brief.

January 13 Filed motion of plaintiff for order of default.

January 13 Filed & entered order of default as to several defendants.

January 20 Entered order denying motion of plaintiff for severance.

January 23 Filed petition Harney County for payment.

January 23 Filed & entered order for payment of Harney County.

February 28 Filed motion of plaintiff for order of default.

February 28 Filed & entered order of default re Thomas T. Dunn Tract.

February 28 Filed plffs motion to dismiss as to Thomas T. Dunn.

March 2 Filed & entered order dismissing as to

Thos. T. Dunn & directing clerk to repay monies.

March 14 Filed receipt of U. S. Atty. for deeds lodged with petitions.

April 13 Filed petition for payment of Walter P. George.

April 13 Filed & entered order for payment of Walter P. George.

June 11 Filed petition of Lee R. George for payment of money for lands.

June 11 Filed & entered order to pay Lee R. George $223.30.

June 16 Filed Petition of Harney Co. for payment of taxes.

June 16 Filed & entered order to pay Harney Co. taxes.

June 17 receipt of Walter P. George.

June 20 Filed receipt of Sheriff, Harney County.

January 30 Filed receipt of Mary Alice Simmons.

Jan. 27 Filed receipt of W. Y. King, Treas. Harney County.

January 20 Filed receipt of John L. Hembree.

June 29 Filed clerk's report re Thomas T. Dunn deposit.

June 29 Filed & entered order authorizing Clerk to deposit $1,511.57 in registry.

July 6 Filed receipt of Lee R. George.

July 10 Filed petition of Elbert F. George for payment.

July 10 Filed ent. order to pay Elbert F. George $223.30.

July 10 Filed petition of Henry A. George for payment.

July 10 Filed & ent. order to pay Henry A. George $223.30.

July 13 Filed & entered order to pay Thomas T. Dunn $1511.57.

July 13 Filed petition of U. S. Atty. for order to pay money to Thos. T. Dunn.

July 14 Filed receipt of Elbert F. George for $223.30.

July 16 Filed receipt of Thomas T. Dunn for $1511.57.

July 30 Filed Answer of Harney County.

October 6 Filed & entered order to pay Wm. Carroll, County Clerk, Harney County $180.45.

October 10 Filed receipt of Wm. Carroll.

December 18 Filed petition for order to pay State Land Board.

December 18 Filed petition for order to pay William Carroll, County Clerk.

December 18 Filed & entered order to pay William Carroll, County Clerk.

December 18 Filed petition for order appointing guardian ad litem.

Filed Entered order appointing guardian ad litem for Jean and Bill Horton.

December 22 Filed receipt of W. M. Carroll for $180.45.

1937

January 25 Filed & entered order of severance as to Gordon T. Carey, et ux.

January 25 Filed & entered order of severance as to William J. George et al.

January 27 Filed Amended petition for condemnation as to Gordon T. Carey.

January 27 Filed Amended petition for condemnation as to William J. George et al.

January 28 Filed & entered order vacating order of Dec. 18, 1936 & to return check.

September 23 Filed motion of Harney County to set for trial.

September 27 Entered order to set for trial for Nov. 23, 1937.

November 23 Record of trial, order to amend answer of Harney County.

November 26 Filed & entered order on issues raised by Harney County.

November 27 Filed transcript of proceedings, with exhibits 1, 2 and 3.

1938

September 26 Filed stipulation re pre-trial, 46.67 acres and Gordon T. Carey.

September 26 Filed demand of U. S. for jury trial.

September 26 Filed stipulation re pre-trial 177.38 acres, and Stacy D. George, et al.

September 26 Filed demand of U. S. for jury trial.

1939

March 9 Filed docketed & entered order to pay Harney Co. $1249.92 out of money in registry of Court. [127]

March 9 Filed, docketed & entered order to pay State Land Board $500. out of money in registry of Court.

March 9 Filed, docketed Petitions of Stacy George and Betty George for payment out of money in registry of Court.

March 9 Filed, docketed & entered order to pay Stacy George & Betty George $223.30 out of money in registry of court.

March 18 Filed docketed receipt of Harney County for $1249.92.

August 22 Filed docketed answer of Gordon T. Carey to amended petition.

September 12 Filed docketed answer of Stacey D. George et al.

September 20 Filed docketed motion of Gordon T. Carey for order to pay money.

September 20 Filed docketed motion of Wm. J. George et al for order to pay money.

1940

March 1 Docketed order to set for Pendleton 1940 Term.

March 27 Docketed order denying application of plff. to strike from Pendleton calendar.

April 4 Filed & docketed motion of ptff. for postponement of trial (George heirs).

April 2 Entered & docketed order postponing trial (of U S v "2 George heirs").

December 4 Filed & docketed motion of Wm. J. George et al to vacate judgment on declaration of taking and for dismissal of petition.

December 4 Filed & docketed brief on foregoing motion.

1941

January 2 Record of hearing on motion of defts. to vacate judgment on declaration of taking and to dismiss petition, argued, brief from ptff.

1942

September 28 Docketed & entered Order setting aside & vacating judgment on the declaration of taking & "decree" & dismissing petition.

October 5 Filed order docketed & entered Sept. 28, 1942. [128]

CERTIFICATE OF CLERK OF MONEYS ON DEPOSIT IN REGISTRY OF COURT

in words and figures as follows, to wit: [129]

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the United States District Court for the District of Oregon, do hereby certify that on June 15, 1935, in accordance with the Judgment on the Declaration of Taking, entered on June 14, 1935, in cause No. L-12492, United States of America vs. 3474.34 Acres, more or less, of Land in Harney County, there was deposited in the registry of said court the sum of $32,227.26, and that there remains on this 25th day of March, 1943, on deposit

in the registry of the said court the sum of $1390.43, in said cause.

Portland, Oregon, March 25, 1943.

G. H. MARSH,

G. H. Marsh, Clerk, United States District Court For the District of Oregon. [130]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 130 inclusive, constitute the transcript of record on appeal from a Judgment of said Court in a cause therein numbered L-12492, in which the United States of America is plaintiff and appellant; and 3474.34 Acres, more or less, of land in Harney County, Oregon, Harney County, et al, are Defendants, and Gordon T. Carey, Stacey D. George, Betty George, William J. George, Edna George, Anna George Carey, Harry Carey, Eliza A. Shoemaker, and E. P. Shoemaker, her husband, are appellees; that said transcript has been prepared by me in accordance with the amended designation of contents of the record on appeal filed therein by appellant and in accordance with the rules of Court, and have included in said transcript as a part thereof a certifi-

cate of the Clerk of the amount of money on deposit in the registry of the court in said case; that I have compared the foregoing transcript with the original record thereof and that the foregoing transcript is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance with the said amended designation.

I further certify that the cost of the foregoing transcript is $5.00 for filing Notice of Appeal, and $28.30 for comparing and certifying the within transcript, making a total of $33.30, which has not been paid by appellant but is a constructive charge against the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 26th day of March, 1943.

[Seal] G. H. MARSH,

G. H. Marsh, Clerk. [131]

[Endorsed]: No. 10398. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Gordon T. Carey, Stacey D. George, Betty George, William J. George, Edna George, Anna George Carey, Harry Carey, Eliza A. Shoemaker and E. P. Shoemaker, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 31, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit
No. 10398

UNITED STATES OF AMERICA,
Appellant.

vs.

HARNEY COUNTY, et al.,
Appellees.

STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The United States of America, appellant in the above-entitled case, intends to rely upon the following points on the appeal:

1. The District Court erred in vacating, setting aside and annulling the judgment on the declaration of taking.

2. The District Court erred in striking the declaration of taking from the files of the court.

3. The District Court erred in dismissing the petition for condemnation.

Respectfully submitted,
NORMAN M. LITTELL,
Norman M. Littell, Assistant Attorney General.
CARL C. DONAUGH,
Carl C. Donaugh, United States Attorney.
J. MASON DILLARD,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Service of the within Statement of Points is accepted this 23rd day of March, 1943, by receiving a duly certified copy thereof.

J. W. McCULLOCH,
Of Attorneys for Appellees.

[Endorsed]: Filed Apr. 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED AS RECORD ON APPEAL

The United States of America, appellant in the above entitled case designates the following portions of the record and proceedings for printing the record on appeal in conformity with Rule 19(6) of this court.

Filed

1. Petition, June 14, 1935.

2. Declaration of Taking, omitting the plat and also omitting the description of the lands taken, substituting for the latter the following: [here follows the same description found in paragraph 3 of the petition], June 14, 1935.

3. Judgment on Declaration of Taking, omitting the description of the lands taken and substituting therefore the following: [here follows the same description found in paragraph 3 of the petition], June 14, 1935.

4. Supplemental Petition, July 19, 1935.

5. Motion of Gordon T. Carey, et al., to make more definite, September 9, 1935.

6. Order of Severance as to Gordon T. Carey, et al, January 25, 1937.

7. Order of Severance as to William J. George, et al, January 25, 1937.

8. Amended Petition for Condemnation as to Gordon T. Carey, January 27, 1937.

9. Amended Petition for Condemnation as to William J. George, et al, January 27, 1937.

10. Petition of Stacy George and Betty George for payment of money on deposit, March 9, 1939.

11. Order to Pay Stacy George and Betty George money on deposit, March 9, 1939.

12. Answer of Gordon T. Carey to an Amended Petition, August 22, 1939.

13. Answer of Stacy D. George, et al, September 12, 1939.

14. Motion of Gordon T. Carey for Order to pay money on deposit, September 20, 1939.

15. Motion of William J. George, et al., for Order to pay money on deposit, September 20, 1939.

16. Motion of William J. George, et al., to Vacate Judgment on Declaration of Taking and for Dismissal of Petition, December 4, 1940.

17. Transcript of Proceedings on Motion to Vacate Judgment on Declaration of Taking and to Dismiss Petition, September 28, 1942.

18. Order Setting Aside and Vacating Judgment on Declaration of Taking, and Dismissing Petition, September 28, 1942.

19. Certified copy of docket entries, omitting names of defendants.

20. Certificate of Clerk of District Court as to amount of deposit under declaration of taking now remaining in court.

21. Affidavit as to the cause of postponement, March 6, 1943.

22. Notice of Appeal, December 26, 1942.

23. Designation of contents of record on appeal, January 25, 1943.

24. Stipulation agreeing to amended designation, March 23, 1943.

25. Amended designation of contents of record on appeal.

26. This designation

Respectfully submitted,
CARL C. DONAUGH,
United States Attorney.
J. MASON DILLARD,
Assistant United States Attorney.

United States of America,
District of Oregon—ss.

Service of the within Designation of Portions of Record to Be Printed is accepted this 23d day of March, 1943, by receiving a duly certified copy thereof.

J. W. McCULLOCH,
Of Attorneys for Appellees.

[Endorsed]: Filed Apr. 17, 1943. Paul P. O'Brien, Clerk.

No. 10398

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

GORDON T. CAREY ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

NORMAN M. LITTELL,
Assistant Attorney General.

CARL C. DONAUGH,
United States Attorney,
Portland, Oregon.

JAMES M. DILLARD,
Assistant United States Attorney,
Portland, Oregon.

VERNON L. WILKINSON,
WILMA C. MARTIN,
Attorneys, Department of Justice,
Washington, D. C.

INDEX

CITATIONS

548431—43——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10398

UNITED STATES OF AMERICA, APPELLANT

v.

GORDON T. CAREY ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. The reasons given by the court for entering the order appealed from are found at R. 82–93.

JURISDICTION

This is an appeal from an order entered September 28, 1942, vacating a judgment on a declaration of taking, striking the declaration of taking from the files, and dismissing the petition for condemnation (R. 78–79). Notice of appeal was filed December 26, 1942 (R. 80). The jurisdiction of the district court was invoked under the Act of August 1, 1888, c. 728, 25

Stat. 357, 40 U. S. C. sec. 257 (R. 3). The jurisdiction of this Court is invoked under section 128 of the Judicial Code as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the petition states a cause of action.
2. Whether the district court had jurisdiction of the proceedings.
3. Whether the trial court exceeded its powers in vacating the judgment on the declaration of taking and dismissing the proceedings.
4. Whether the parties moving for dismissal were estopped to attack the validity of the condemnation proceedings.

STATUTES AND EXECUTIVE ORDER INVOLVED

The pertinent provisions of section 1 of the Act of August 1, 1888, 25 Stat. 357, c. 728, 40 U. S. C. sec. 257; sections 1 and 2 of the Unemployment Relief Act of March 31, 1933, 48 Stat. 22; section 14 of the Emergency Relief Appropriation Act for 1935, 49 Stat. 119, April 8, 1935; Executive Order No. 6724, May 28, 1934, are set out in the appendix, *infra*, p. 20–23.

STATEMENT

On June 14, 1935, the United States instituted proceedings to condemn 3,474.34 acres of land in Harney County, Oregon. The petition alleged that the proceedings were instituted under the authority of the Unemployment Relief Act of March 31, 1933, 48 Stat. 22; Executive Order No. 6724, May 28, 1934; and the Act of August 1, 1888, 25 Stat. 357, 40 U. S. C. sec.

257, 258, "for use in the construction of useful public works and improvements in connection with the Lake Malheur Migratory Waterfowl Refuge, and for such other uses as may be authorized by Congress or by Executive Order" (R. 3). With the petition the Government filed a declaration of taking pursuant to the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a, and deposited $32,227.26 in court as estimated compensation. On the same day an ex parte judgment was entered declaring that the United States was entitled to acquire the property for the purposes set out in the petition, confirming the passage of title by the declaration of taking, and ordering the delivery of possession on or before July 15, 1935 (R. 1–26). A supplemental petition was filed July 19, 1935, naming as defendants additional persons who had or might have had some interest in the property taken (R. 26–32).

The property described in the petition (R. 3–6) and the declaration of taking (R. 21) were certain fractional sections located along the Neal survey line around Lake Malheur, Mud Lake, and the Narrows,[1]

> And together therewith all right, title, claim, and interest of the owners of said tracts to lands lying within the Neal survey lines, purporting to surround Malheur and Mud Lakes, and the Narrows.

Twenty parcels were included in the total acreage described in the petition and the declaration of taking (R. 3–6). From time to time the owners of the vari-

[1] See *United States* v. *Otley*, 127 F. 2d 998 (C. C. A. 9, 1942); *United States* v. *Oregon*, 295 U. S. 1, 5 (1935).

ous parcels petitioned to withdraw their shares of the deposit, and upon order of court payments were made (R. 102–109). Most of the withdrawals were made in the latter part of 1935 and first part of 1936.[2] Orders of default were entered on January 13 and February 28, 1936, as to numerous defendants having or claiming an interest in the land taken (R. 105). It does not appear in the record on appeal how many parties were defaulted, but numerous parties who might have had or claimed an interest in all of the parcels except Parcels 4e, 14a, b, 16, and 31a were included. Many of the owners withdrawing the deposits executed deeds confirming the passage of title to their property to the United States (R. 85, 90–91). This fact together with the default orders meant the disposal of most of the issues in the case except those arising out of the pleadings filed by the owners of certain interests in Parcels 16 and 31a.

On September 9, 1935, Gordon T. Carey, claimant of an undivided one-half interest in Tract 31a, and Georgia E. George, Raymond L. George, Clifford E. George, William J. George, and Edna George, his wife, Anna Carey and Harry A. Carey, her husband, Eliza O. Shoemaker and E. O. Shoemaker, her husband, Stacy D. George and Betty M. George, his wife, claimants of certain undivided interests in Tract 16, moved the court to require the United States to make more definite and certain that portion of the petition set out above with reference to the lands within

[2] At the present time there remains on deposit only $1,390.43 of the total $32,227.26 originally deposited in court (R. 110–111).

the Neal survey lines by setting forth and particularizing what area within the Neal survey lines in front of Tracts 16 and 31a the Government was seeking to acquire by the condemnation proceeding (R. 32). This motion raised complex questions of riparian rights and the title to lands in the bed of Lake Malheur. To settle the question of title to the land in the lake bed, a suit to quiet title was instituted by the United States in the district court on December 17, 1936. See *United States* v. *Otley,* 127 F. 2d 988 (C. C. A. 9, 1942).

On January 25, 1937, upon oral stipulation of the parties in open court, the undivided one-half interest of Gordon T. Carey in Tract 31a, and the undivided four-ninths interest of William George and Edna George, his wife; Anna Carey and Harry Carey, her husband; Eliza O. Shoemaker and E. O. Shoemaker, her husband; and Stacy D. George and Betty E. George, his wife, in Tract 16 were severed and leave was given the United States to file an amended petition as against those interests, excluding therefrom any and all portions of the property lying within the Neal survey line (R. 34–37).[3] Amended petitions were accordingly filed on January 27, 1937, setting out in detail the authority for and the purpose of the proceedings and alleging that the property described in the original petition as Tracts 16 and 31a, did not include

[3] All of the persons whose interests were thus severed had been made parties to the suit to quiet title, in addition to other persons owning lands around Lake Malheur, but not involved in the condemnation proceeding. See *United States* v. *Otley*, 127 F. 2d 988 (C. C. A. 9, 1942).

any riparian rights which the defendants may have had or claimed as appurtenant to their tracts or any lands within the Neal survey lines (R. 38–54). The amended petitions alleged as authority for taking, the Unemployment Relief Act of March 31, 1933, 48 Stat. 22, as continued by section 14 of the Emergency Relief Appropriation Act for 1935, 49 Stat. 115, 119, April 8, 1935; the Fourth Deficiency Appropriation Act for the Fiscal Year 1933, 48 Stat. 274, 275; Executive Order 6724, May 28, 1934. The petitions then alleged that under the Act of March 31, 1933, 48 Stat. 22, and by authority of the President, the Secretary of Agriculture had duly adopted an emergency conservation works project for the improvement of the Lake Malheur Reservation; that the project included the construction of dikes, the building of water control structures, the conservation of water, the control of flood water, the construction of truck trails, food and cover planting, fire protection and the building of nesting islands to provide additional food and cover for waterfowl. It was also alleged that this program would be effective to relieve unemployment, restore depleted natural resources, and would result in the construction of useful public works, and that the lands taken would be used for the emergency conservation works theretofore described and also as a part of the Lake Malheur Reservation for the restoration and conservation of migratory birds.

On March 9, 1939, Stacy and Betty George filed a petition alleging that it was intended in the condemnation proceeding to acquire all right, title and interest in the lake bed, that it had been agreed that the claims

asserted by the owners of the undivided four-ninths interest in Tract 16 would be determined in the *Otley* case and asking to withdraw their share of the deposit "without prejudice to any right which they might ultimately have for additional compensation in the event they are awarded ownership * * *" of lands in the lake bed. Payment of the deposit to these parties was ordered by the court. (R. 56–60.)

On August 22, 1939, Gordon T. Carey answered the amended petition denying all allegations except his ownership of the one-half interest in Parcel No. 31a and praying for judgment against the United States for the alleged value of his land. On September 12, 1939, Stacy D. George, William J. George, and the other owners of a four-ninths interest in Parcel No. 16 filed a similar answer to their amended petition. (R. 60–68.)

On September 20, 1939, Gordon T. Carey petitioned for an order to withdraw his share of the deposit made for Tract 31a. On the same day William J. George and Edna George, his wife; Anna George Carey and Harry A. Carey, her husband; Eliza O. Shoemaker and E. O. Shoemaker, her husband; Stacy D. George and Betty M. George, his wife, petitioned for an order to withdraw their shares of the deposit. (R. 68–75.) It does not appear that these petitions were ever acted upon by the court.

On June 29, 1940, the district court announced its decision in the *Otley* case, generally sustaining the riparian claims of patentees along the Neal line. On December 4, 1940, William J. George, Anna Carey, and Eliza O. Shoemaker, owners of an undivided three-

ninths interest in Parcel No. 16, and Gordon T. Carey, owner of an undivided one-half interest in Parcel No. 31a, moved to vacate the judgment on the declaration of taking and dismiss the petition filed on June 14, 1935, on the grounds that the petition did not state sufficient facts to constitute a cause of action, and that the court had no jurisdiction (R. 76–77). A hearing on the motion was had on January 2, 1941, and a brief was filed by the United States (R. 110), but no action was taken until after this Court decided the Government's appeal in the *Otley* case on April 21, 1942.

On September 28, 1942, at the next term of the district court, Mr. Dillard, the Assistant United States Attorney, appeared for the United States and Messrs. Hicks and McCulloch appeared as attorneys for Wm. J. George, Anna Carey, Eliza O. Shoemaker, and Gordon T. Carey in the condemnation proceeding (R. 82). The court's attention was directed to the motion of December 4, 1940, to dismiss the proceeding which was still pending (R. 86–88).

The court stated that he would rather not set aside the proceedings on the grounds urged by the owners, but apparently because of an informal conference with another government official he was in doubt as to what the government intended to do with the case. It was his impression, although he was not sure that it was true, that the Government would like to abandon the proceeding. Counsel representing the United States, who knew nothing of any such intention on the part of the Government, stated that the Government would be ready for trial if the case were set for hearing and that so far as he knew it still wanted the land it had

set out to acquire. (R. 90–92.) The court then ruled that he would dismiss the *entire* proceeding, with the following comment (R. 93):

> I am going to find out what is happening in this case. I will just dismiss it and then maybe something will happen. I haven't been able to get anything done for seven years. I don't know whether it is properly founded or not. I will probably be reversed in it, but I am willing to take that chance.

An order vacating the judgment on the declaration of taking, striking the declaration of taking from the files of the court, and dismissing the petition for condemnation was entered on September 28, 1942 (R. 78–79). Notice of appeal was filed on December 26, 1942 (R. 80).

SPECIFICATION OF ERRORS

The district court erred—

1. In vacating, setting aside and annulling the judgment on the declaration of taking.

2. In striking the declaration of taking from the files of the court.

3. In dismissing the petition for condemnation.

ARGUMENT

No reason was given by the court below for vacating the judgment on the declaration of taking, striking the declaration of taking from the files, and dismissing the petition. In fact, Judge Fee admitted he didn't "know whether it [the dismissal] was properly founded or not." He was just going to dismiss the case and maybe something would happen (R. 93).

The grounds assigned in the motion to dismiss are that the petition does not state sufficient facts to constitute a cause of action and that is does not state sufficient facts to give the court jurisdiction. Neither of these objections is well taken.

I

The district court had jurisdiction of the proceedings

As alleged in the petition and declaration of taking this proceeding was brought pursuant to the Act of August 1, 1888, c. 728, sec. 1, 25 Stat. 357, 40 U. S. C. sec. 257, which provides as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, * * *.

Clearly this section confers upon the court jurisdiction of condemnation proceedings. *United States* v. *Nudelman,* 104 F. 2d 549, 552 (C. C. A. 7, 1939), certiorari denied 308 U. S. 589.

The petition alleges the authority of the Secretary of Agriculture to acquire the property and his determination that it was necessary and advantageous to the United States to acquire the lands described in

the petition by condemnation (R. 2–3). Thus, the jurisdictional facts were sufficiently alleged. However, even if they had been defective, and it has not been shown that they were, the district court, nevertheless, acquired jurisdiction and could have permitted an amendment to cure any defects. *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 685–686 (1896); *Goodman* v. *City of Ft. Collins,* 164 Fed. 970 (C. C. A. 8, 1908). Cf. *Forbes* v. *United States,* 268 Fed. 273, 277 (C. C. A. 5, 1920).

II

The institution of the proceedings was authorized

The condemnation proceedings were authorized by the Unemployment Relief Act of March 31, 1933, 48 Stat. 22, as continued by section 14 of the Emergency Relief Appropriation Act for 1935, 49 Stat. 115, 119, April 8, 1935, and Executive Order No. 6724, May 28, 1934. Section 1 of the Unemployment Relief Act of March 31, 1933, 48 Stat. 22, provided in part as follows:

> That for the purpose of relieving the acute condition of widespread distress and unemployment now existing in the United States, and in order to provide for the restoration of the country's depleted natural resources and the advancement of an orderly program of useful public works, the President is authorized, under such rules and regulations as he may prescribe and by utilizing such existing departments or agencies as he may designate, to provide for employing citizens of the United States who are unemployed, in the construction, maintenance and carrying on of works of a public nature in connection with the forestation of

> lands belonging to the United States * * * the prevention of forest fires, floods and soil erosion, plant pest and disease control, the construction, maintenance or repair of paths, trails and fire-lanes in the national parks and national forests, and such other work on the public domain * * * and Government reservations[4] incidental to or necessary in connection with any projects of the character enumerated, as the President may determine to be desirable: * * *

Section 2 of the Act authorized the President, or the head of any department or agency authorized by him, for the purpose of carrying out the provisions of the Act, "to acquire real property by purchase, donation, condemnation, or otherwise * * *."[5]

The President, on May 28, 1934, issued the following order (Executive Order No. 6724):

> WHEREAS it is necessary to purchase or rent various lands in order to provide suitable refuges for, and to protect and conserve, migratory birds and other wild life constituting depleted natural resources of the United States; and
>
> WHEREAS the work and improvements necessary to be performed and made upon such lands to make them suitable and proper refuges for migratory birds and other wild life will provide protection for such lands from forest fires,

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[4] As alleged in the amended petition, the Lake Malheur Reservation was established by Executive Order No. 929, August 18, 1908. See *United States* v. *Otley*, 127 F. 2d 988, 991 (C. C. A. 9, 1942).

[5] The President's authority under this Act was extended to March 31, 1937, by section 14 of the Emergency Relief Appropriation Act of April 8, 1935, 49 Stat. 119.

floods, and soil erosion, and plant pest and disease, and aid in the restoration of the country's depleted natural resources; and

WHEREAS the purchase of such lands will provide employment for citizens of the United States who are unemployed;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of Congress entitled "An act for the relief of unemployment through the performance of useful public work, and for other purposes," approved March 31, 1933 (ch. 17, 48 Stat. 22), and the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (ch. 100, 48 Stat. 274, 275), the Secretary of Agriculture is hereby authorized to expend for the purchase [6] or rental of such lands as are suitable for the aforesaid purpose (including the costs incident to purchase or rental) not more than $1,000,000 of the sum of $20,000,000 allocated from the appropriation for National Industrial Recovery and made available to the Secretary of Agriculture by Executive Order No. 6208, of July 21, 1933, for the purchase of forest lands for emergency conservation work.

The executive order was authorized by the Unemployment Relief Act of 1933. 37 Op. A. G. 445 (1934).[7]

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[6] If the purchase is authorized it follows that condemnation is also authorized. Act of August 1, 1888, 40 U. S. C. sec. 257, 25 Stat. 357; *Albert Hanson Lumber Company* v. *United States*, 261 U. S. 581, 585–586 (1923); *Barnidge* v. *United States*, 101 F. 2d 295, 297 (C. C. A. 8, 1939); *United States* v. *Threlkeld*, 72 F. 2d 464, 466 (C. C. A. 10, 1934); *United States* v. *Graham & Irvine*, 250 Fed. 499, 501–502 (W. D. Va., 1917).

[7] The executive order under consideration by the Attorney General was No. 6684 which was rescinded by Executive Order No.

Consequently it is apparent that the proceedings were authorized and could not have been properly dismissed for lack of authority.

III

The taking was for a public use

The original petition and the declaration of taking state that the lands involved are being acquired for use in the construction of useful public works and improvements in connection with the Lake Malheur Migratory Waterfowl Refuge and for such other uses as may be authorized by Congress or by executive order (R. 3, 20). The amended petitions filed as to Tracts 16 and 31a contain more detailed allegations as to the purpose of the acquisition and allege as follows (R. 40–41, 49–50):

> * * * the Secretary of Agriculture has duly adopted an emergency conservation works project for the improvement of the Lake Malheur Reservation. This project includes the construction of dikes; the building of water-control structures; the conservation of water; the control of flood-waters; the construction of truck trails; food and cover planting; fire protection; and the building of nesting islands to provide additional food and cover for waterfowl. * * * This program of improvement is effective to relieve unemployment, restore depleted natural resources, and will result in the construction of useful public works * * *
>
> The tract of land described * * * is requisite and necessary to be fully vested in the

6724. The two orders were identical except for a change in the allocation of funds. See Appendix, pp. 21–23.

> United States of America, free and clear of all outstanding claims of ownership, for the reason that a part of said emergency conservation work is necessary to be done thereon, or because the said land will be affected thereby. The public use for which the said lands now are required is the accomplishment of the emergency conservation works project herein described, but the said lands are also to be used as a part of the Lake Malheur Reservation for the restoration and conservation of migratory birds in furtherance of the objects of the Migratory Bird Treaty (39 Stat. 1702), the Migratory Bird Treaty Act (40 Stat. 755), the Migratory Bird Conservation Act (46 Stat. 1222), and for such other public uses as may be authorized by Congress or by Executive Order.

If the Federal Government has power under the Constitution to embark upon a project for which land is sought, the use is a public one. *United States* v. *Gettysburg Electric Ry. Co.,* 160 U. S. 668, 679 (1896); *Barnidge* v. *United States,* 101 F. 2d 295, 298 (C. C. A. 8, 1939). Hence, projects for the prevention of unemployment, conservation of natural resources, prevention of soil erosion, reforestation, and protection and preservation of migratory birds are for public purposes under the Constitution. *Steward Machine Co.* v. *Davis,* 301 U. S. 548, 586–587 (1937); *Missouri* v. *Holland,* 252 U. S. 416, 432, 435 (1920); *United States* v. *Montana,* 134 F. 2d 194, 196–197 (C. C. A. 9, 1943); *Bastian* v. *United States,* 118 F. 2d 777, 778–779 (C. C. A. 6, 1941); *United States* v. *Dieckmann,* 101 F. 2d 421, 424–425 (C. C. A. 7, 1939); *School District No. 37*

v. *Isackson,* 92 F. 2d 768, 771 (C. C. A. 9, 1937); *In re United States,* 28 F. Supp. 758, 761–765 (W. D. N. Y. 1939); *United States* v. *546.03 Acres, More or Less, of Land, etc.,* 22 F. Supp. 775, 777 (W. D. Pa. 1938); *United States* v. *2,271.29 Acres of Land,* 31 F. 2d 617, 620, 621 (W. D. Wis. 1928).

IV

The trial court exceeded his powers in vacating the judgment on the declaration of taking and dismissing the proceedings

When, pursuant to the provisions of the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. sec. 258a, a declaration of taking was filed in this case and the estimated compensation deposited in court, title to the lands described vested in the United States and could be divested only by congressional authorization. *United States* v. *Sunset Cemetery,* 132 F. 2d 163, 164 (C. C. A. 7, 1942). Neither the court nor any agent of the Government had power thereafter to divest the United States of title. It is not meant, of course, that the proceedings could not be dismissed if the court, upon proper motion, found that there was, for example, no authority for the taking. In such case the declaration of taking would be a nullity and ineffective to vest title. *City of Oakland* v. *United States,* 124 F. 2d 959, 963 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679. However, as has been shown, no such ground is presented in this case for vacating the judgment and dismissing the proceedings.

The only apparent reasons for the action taken by the court were his doubts as to what the Government

intended to do with the case and the delay in concluding the proceedings. Clearly, the judge's doubts as to what the Government intended to do, based on an impression received from an informal conference with another Government official, an impression he "was not sure was true" is not justification for dismissing the proceeding and striking from the files the declaration of taking which had vested title in the United States to some 4,000 acres of land for which over $30,000.00 had already been paid by court order in the proceedings.[8]

The delay in finally concluding the proceedings was due to the necessity of awaiting the decree in the *Otley* case, which would settle the title disputes in this case (R. 90). Government counsel appeared when the case was called at the first term of court after the *Otley* decision and stated that "of course we [the Government] would have to be ready for trial" if the case were set for a hearing (R. 91). Consequently there was no lack of prosecution on the part of the Government to justify a dismissal even if the court had had power to do so.

V

The parties moving for dismissal were estopped to attack the validity of the proceedings

Gordon T. Carey, William J. George, Anna Carey, and Eliza Shoemaker, the owners who moved to dis-

[8] Although the apparent owners of most of the parcels executed confirmatory deeds (*supra*, p. 4), their titles were not acceptable to the Attorney General (see R. 6–17). Thus, unless the condemnation proceedings are reinstated the United States will not have acquired an unencumbered title even as to the parcels for which deeds were given.

miss the proceedings on the grounds that the petition did not state sufficient facts to constitute a cause of action and that the petition did not state sufficient facts to give the district court jurisdiction, were estopped to raise any objection to the proceedings. On September 20, 1939, these parties had moved to withdraw the money deposited in court as estimated compensation for their interests (R. 68–75). It was after this that they moved for dismissal (R. 76–77). Thus, although seeking the benefits, these parties attack the validity of the proceeding.

The right to object to the validity of a statute authorizing a condemnation proceeding may be lost by waiver or estoppel. *United States* v. *Nudelman,* 104 F. 2d 549, 552–553 (C. C. A. 7, 1939), certiorari denied 308 U. S. 589. In that case it was held that an owner who had consented to the entry of judgment and accepted payment for five other parcels owned by her and taken for the same project in contemporaneous proceedings was estopped to attack the Government's authority to condemn. One cannot, after accepting the benefits of a statute, attack its validity. *St. Louis Co.* v. *Prendergast Co.,* 260 U. S. 469 (1923); *State* v. *Melville,* 149 Ore. 532, 548–549, 39 P. 2d 1119, 41 P. 2d 1071 (1935); *Oregon* v. *Portland Gen. Elec. Co.,* 52 Ore. 502, 530, 95 Pac. 722 (1908). In fact, actual receipt of benefits under a statute are not necessary to constitute an estoppel. It is sufficient if they are sought. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 598–600 (1888). Consequently, the

parties moving for dismissal are estopped by their motion to withdraw the deposit from raising any objection to the validity of the proceedings.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order appealed from should be reversed.

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SEPTEMBER 1943.

APPENDIX

Section 1 of the Act of August 1, 1888, 25 Stat. 357, c. 728, 40 U. S. C. sec. 257, provides, in part, as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. And the United States district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, * * *.

Sections 1 and 2 of the Unemployment Relief Act of March 31, 1933, 48 Stat. 22–23, provide, in part, as follows:

> That for the purpose of relieving the acute condition of widespread distress and unemployment now existing in the United States, and in order to provide for the restoration of the country's depleted natural resources and the advancement of an orderly program of useful public works, the President is authorized, under such rules and regulations as he may prescribe and by utilizing such existing departments or agencies as he may designate, to provide for employing citizens of the United States who are unemployed, in the construction, maintenance and carrying on of works of a public nature in connection with the forestation of lands belong-

ing to the United States or to the several states which are suitable for timber production, the prevention of forest fires, floods and soil erosion, plant pest and disease control, the construction, maintenance or repair of paths, trails and fire-lanes in the national parks and national forests, and such other work on the public domain, national and State, and Government reservations incidental to or necessary in connection with any projects of the character enumerated, as the President may determine to be desirable: * * *

SEC. 2. * * * the President, or the head of any department or agency authorized by him to construct any project or to carry on any such public works, shall be authorized to acquire real property by purchase, donation, condemnation, or otherwise, * * *

Section 14 of the Emergency Relief Appropriation Act for 1935, 49 Stat. 115,119, April 8, 1935, provides as follows:

> The authority of the President under the provisions of the Act entitled "An Act for the relief of unemployment through the performance of useful public work, and for other purposes" approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

Executive Order No. 6724, May 28, 1934, provides as follows:

> WHEREAS it is necessary to purchase or rent various lands in order to provide suitable refuges for, and to protect and conserve, migratory birds and other wild life constituting depleted natural resources of the United States; and
>
> WHEREAS the work and improvements necessary to be performed and made upon such lands to make them suitable and proper refuges for migratory birds and other wild life will provide protection for such lands from forest fires, floods and soil erosion, and plant pest and disease, and

aid in the restoration of the country's depleted natural resources; and

WHEREAS the purchase of such lands will provide employment for citizens of the United States who are unemployed;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of Congress entitled "An act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933 (ch. 17, 48 Stat. 22), and the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (ch. 100, 48 Stat. 274, 275), the Secretary of Agriculture is hereby authorized to expend for the purchase or rental of such lands as are suitable for the aforesaid purposes (including the costs incident to purchase or rental) not more than $1,000,000 of the sum of $20,000,000 allocated from the appropriation for National Industrial Recovery and made available to the Secretary of Agriculture by Executive Order No. 6208, of July 21, 1933, for the purchase of forest lands for emergency conservation work.

Executive Order No. 6684, of April 19, 1934, authorizing the purchase or rental of land for emergency conservation work, is hereby rescinded.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
May 28, 1934.

Executive Order No. 6684, April 19, 1934, rescinded by Executive Order No. 6724, May 28, 1934, provided as follows:

WHEREAS it is necessary to purchase or rent various lands in order to provide suitable refuges for, and to protect and conserve, migratory birds and other wild life constituting depleted natural resources of the United States; and

WHEREAS the work and improvements necessary to be performed and made upon such lands to make them suitable and proper refuges for migratory birds and other wild life will provide protection for such lands from forest fires, floods and soil erosion, and plant pest and disease, and aid in the restoration of the country's depleted natural resources; and

WHEREAS the purchase of such lands will provide employment for citizens of the United States who are unemployed;

NOW, THEREFORE, by virtue of and pursuant to the authority vested in me by the act of Congress entitled "An act for the relief of unemployment through the performance of useful public work, and for other purposes", approved March 31, 1933 (48 Stat. 22), the purchase or rental of such lands as are suitable for the aforesaid purposes is hereby authorized; and by virtue of the authority vested in me by the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 274), the sum of $1,000,000 is hereby allocated for the purchase or rental of such lands (including the costs incident to purchase or rental) from the appropriation made by the said deficiency act for carrying into effect the provisions of the said act of March 31, 1933.

The sum herein allocated shall be transferred by the Treasury Department to the credit of the War Department for the purchase or rental of such lands (including the costs incident to purchase or rental) and shall, upon request of the Chief of Finance, under direction of the Director of Emergency Conservation Work, be transferred by the Treasury to the credit of the Department of Agriculture, and the funds so transferred shall be withdrawn on requisition by the Secretary of Agriculture.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
April 19, 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1943

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 10398

UNITED STATES OF AMERICA,
Appellant,

vs.

GORDON T. CAREY, et al,
Appellees.

BRIEF OF APPELLEES

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Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

On June 14th, 1935, the United States filed, in the District Court, a petition to condemn 3,474.34 acres of land in Harney County, Oregon, and also, at the same time, filed in said court a Declaration of Taking made March 27th, 1935, by M. L. Wilson, Acting Secretary of Agriculture of the United States. (R. 20-22.) On the same date, June 14th, 1935, the District Court made and entered a judgment on the Declaration of Taking. (R. 22-26.)

On December 4th, 1940, William J. George, et al, filed a motion in said court, asking that the judgment on Declaration of Taking be annulled and vacated,

and that the petition of plaintiff be dismissed. (R. 76-77.)

On September 22nd, 1942, the District Court made an order vacating the judgment on Declaration of Taking, and dismissed the petition.

The lands involved are a part of the lake bed of Malheur Lake, and it may be helpful to here make a brief statement as to the history of such lands, as shown by the record of this case and by the decisions of the Federal Courts.

This Court has judicial notice of facts stated in the opinion of this court in *United States vs. Otley, et al,* 127 F. (2d) 988, and also of the facts related in the case of *United States vs. Oregon,* 295 U.S. 1. A summary of the history of Malheur Lake, as shown by the cases above mentioned, and by the records of this case, is as follows:

Prior to the year 1930, the title to the lands in the lake bed of Malheur Lake was in dispute. The State of Oregon claimed title to such lake bed because, as it claimed, Malheur Lake was a navigable lake when Oregon was admitted into the Union, and that the State, on admission, acquired title to the beds of all navigable lakes.

The United States claimed that the lake is not and never had been a navigable lake, and that the State of Oregon never at any time had title to the lake bed.

Certain individuals, including the appellees herein, claimed title to portions of the lake bed, by reason of being land owners abutting on the meander line of a non-navigable lake.

As shown by *United States vs. Oregon,* 295 U.S. 1, the United States in 1930, begun a proceeding in the Supreme Court of the United States to determine whether or not Malheur Lake was a navigable lake at the time Oregon was admitted into the Union. The Supreme Court, in 1935, decided that Malheur Lake is a non-navigable lake, and thereby disposed of Oregon's claim to title.

During the year 1934, and the early part of 1935 (while the ownership of the lake bed was in dispute), representatives of the Secretary of Agriculture interviewed all persons who owned lands bordering on the meander line of Malheur Lake, and attempted to acquire, by purchase, the patented lands of the land-owner bordering on the meander line of the lake. We think the record shows that at this time, the only lands sought were the patented lands bordering on the meander line. (R. 3-5; 9-15.) The lake bed at this time was still being claimed by the State, the Government, and by certain abutting land-owners.

On June 14th, 1935, the United States filed in the District Court, the Petition to condemn, the Declaration of Taking, and the Judgment on Declaration of Taking, involved in this appeal. Each of these, after

describing the lands sought by condemnation, contained the following clause:

> "And together therewith all right, title, claim and interest of the owner of said tracts to lands lying within the Neal survey lines purporting to surround Malheur and Mud Lakes and the Narrows."

In September, 1935, the appellees herein filed in said cause a motion asking that the United States set forth and particularize what area within the Neal survey line the petitioner sought to acquire by such condemnation proceedings. In January, 1937, the District Court, at the request of the petitioner, made an order directing a severance of the appellees herein from the original petition to condemn, and permitting the plaintiff to file an amended petition as to said appellees, and on said date, the amended petition was filed in said cause. (R. 46.)

Paragraph 8 of said amended petition is as folows:

> "The property sought to be acquired does not include any rights which the defendants may have or claim as appurtenant to said lands because riparian thereto, and it does not include any rights, title, interest or estate of the defendants in the lands or waters inside the Neal survey lines, claimed by defendants to be meander line of 'Malheur Lake,' as shown by and in accordance with the official plat of said Township 26 South, Range 32 E. W.M. (N.M.L.), as approved by the General Land Office and on file with the Surveyor General; and it also does not include any lands claimed to be relicted lands within the Malheur Lake Division, as described by the

United States Supreme Court decree dated June 5th, 1935, in re *United States vs. Oregon,* recorded in Book 36, p. 546, Harney Co. Or. records."

No attempt was ever made by the Court or the Government to change or modify the Declaration of Taking, or the Judgment on Declaration of Taking, of June 14th, 1935, in each of which the statement still remains that the United States has taken the lands therein described (including appellees lands), "and together therewith all the right, title, claim and interest of the owners of said tracts (including the appellees herein), to lands lying within the Neal survey line, etc."

No Declaration of Taking was filed as to lands owned by the parties included in the Amended Petition, and as to them, there is no Declaration of Taking unless the original is still in force.

On December 4th, 1940, the appellees herein filed a motion to vacate the Judgment on Declaration of Taking, and for a dismissal of the Petition.

On September 28th, 1942, the District Court made the Order now under consideration on this appeal.

ARGUMENT

The order and judgment of the court made Sep-

tember 22nd, 1942, should be sustained for the following reasons:

1. There is no authority given by Congress for instituting such a proceeding;

2. The complaint or petition does not state sufficient facts to constitute a cause of action;

3. The district court may of its own motion, dismiss, for lack of prosecution, after a cause has been pending for a period of more than seven years.

First—as to authority, or lack of authority, to bring the condemnation proceeding:

Paragraph 1 of the petition, says:

> "This petition is filed under the authority and provisions of the Act for the Relief of unemployment Through the Performance of Useful Public Works approved March 31, 1933 (48 Stat. 22), and pursuant to Executive Order No. 6724, dated May 28, 1934, authorizing the purchase or rental of land for emergency conservation work." (R. 2.)

The act of March 31, 1933, does not provide for the purchase or condemnation of private lands for a bird refuge. The said Act specifically prohibits the acquisition of private lands for such purposes. We quote from said Act as follows:

> "The President is authorized to provide for the employment of citizens of the United States, not otherwise employed, in the construction and

> maintenance and carrying on of work of a public nature in connection with the *forestation of lands belonging to the United States, or to the several states which are suitable for timber production,* the prevention of forest fires, flood and soil erosion, plant pest and disease control, the construction maintenance or repair of paths, trails and fire-lanes in the national parks and national forests, and such other work *on the public domain, national and state,* and Government reservations incidental and necessary in connection with any project of the character enumerated, as the President may determine to be desirable."

It should be here noted that the President is limited by the Act, to fire control projects and reforestation projects *on public lands of the nation or state.*

The Act then continues as follows:

> "Provided: That the President may in his discretion extend the provisions of the Act to lands owned by counties or municipalities, and to lands of private ownership, *but only for the purpose of doing thereon such kinds of cooperative work* as are now provided for by the Acts of Congress in preventing and controlling forest fires and the attacks of forest tree pests and diseases, and such work as is necessary in the public interest to control floods."

From the foregoing, it should be clear that the Act of March 31st, 1933, definitely limited the authority of the President, and prohibited the acquisition of private lands, except for the purposes set forth and designated in the Act.

Appellees contend that the Act of Congress of

March 31, 1933 (48 Stat. 22), grants no power or authority to condemn private lands for a Migratory Waterfowl Refuge.

We assume it is conceded that the Government cannot take private property by condemnation proceedings, unless authorized to do so by some Act of Congress. The petition recites that this proceeding is brought by virtue of the authority given by Act of Congress of March 31, 1933. That Act, a part of which is set out in appendix to appellants' brief, specifically prohibits the acquisition of private lands for the purposes set forth in the petition.

The Act of March 31, 1933, as set out in appellants' brief limits the President's unemployment operations to lands of *the United States or of the several states.*

Appellant quotes from paragraph 2 of the Act for the purpose of showing authority from Congress to acquire by condemnation proceedings. Said section two gives authority to condemn the class of property designated in section one of the Act, *"to carry on such public works."*

We contend that Congress has not authorized the Secretary of Agriculture, or the plaintiff, to acquire by condemnation, privately owned lands for the purposes set forth in the petition herein.

If there is no authority given by Congress to acquire the lands, then the Declaration of Taking is of

no force, and the District Court is without jurisdiction.

Our second objection is: The complaint or petition does not state sufficient facts to constitute a cause of action.

Section 258 of Title 40, U.S.C.A. is as follows:

> "The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of Section 257 of this title shall conform, as near as may be, to the practice, pleadings, forms and proceeding existing at the time in like causes, in the courts of record in the state within which such district court is held, any rule of the court to the contrary notwithstanding."

The petition in its paragraph 2, states that it is proceeding under Sections 257-258, U.S.C.A.

The petition in this case does not conform to the practice, pleadings or proceeding as prescribed by the laws of Oregon, as hereinafter pointed out:

Section 37-401 Oregon Laws, requires that in condemnation cases, the action shall be brought against the owner, or the person in possession of the lands. The statute makes the action a personal action.

Section 37-402 Oregon Laws, provides as follows:

> "Such action shall be commenced and proceeded with to final determination in the same manner as an action-at-law."

Section 1-704 of the Oregon Statutes, requires that every complaint shall contain three parts, as follows:

(1) The title of the cause, specifying the name of the court, and the name of the parties to the action, plaintiff and defendant;

(2) A plain and concise statement of the facts constituting the cause of action;

(3) A demand for the relief claimed.

In its petition for condemnation, the Government proceeds against 3474.34 acres of privately owned lands. The title of the cause is stated as follows:

"IN THE DISTRICT COURT
OF THE UNITED STATES,
FOR THE DISTRICT OF OREGON
No. 12492
UNITED STATES OF AMERICA,
Petitioner,
vs.
3474.34 ACRES MORE OR LESS, OF LAND IN HARNEY COUNTY, OREGON; HARNEY COUNTY, et al,
Defendants.
PETITION FOR CONDEMNATION" (R-2)

The Petition is not against the owner or the person in possession, and does not designate the parties defendant as required by the Oregon laws. The proceeding is against a tract of land, and not against the owners of the land. Neither in the title, nor in the body

of the petition is any party designated as the owner of any land.

The Oregon law also requires that every complaint shall contain a plain and concise statement of the facts constituting the cause of action.

The only attempted statement of facts constituting a cause of action is found in paragraph two of the petition which is as follows:

> "The Secretary of Agriculture has selected for acquisition by the United States, the lands hereinafter described for use in the construction of useful public works and improvement in connection with the Malheur Lake Migratory Waterfowl Refuge, and for such other uses as may be authorized by Congress, or by Executive Order. The said lands are necessary and are required for immediate use, in order that said construction work may be begun. In the opinion of the Secretary of Agriculture, it is necessary, advantageous and in the interest of the United States that said lands be acquired by judicial proceedings as authorized by Act of Congress approved August 1, 1888. (25 Stat. 357; 40 U.S.C.A. 257-258.)"

Then follows paragraph 3, the first five lines of which is as follows:

> "The lands sought to be acquired in this proceeding are described as follows:
> 'Malheur Lake Reservation Extension Tracts, 3474.34 acres, more or less, in Harney County, Oregon.'" (R. 3.)

Appellees contend that the foregoing statement

does not state a cause of action against these appellees. Attention is called to the fact that the appellees, Edna George, Anna Carey, Harry Carey, E. O. Shoemaker, Eliza A. Shoemaker and Betty George, were never mentioned in the Petition or Declaration of Taking, or otherwise. Said appellees above mentioned were brought in by the Amended Petition filed January 27, 1937. (R. 48-52.) These appellees could not be deprived of their lands until there was a proceeding pending against them. Section 258a, T. 40, U.S. C.A., provides that such Declaration of Taking may be filed only *after a proceeding is pending.* It is our contention that no valid proceeding was pending against any of the appellees at the time the Declaration of Taking was filed, in June, 1935. The appellant admits that no proceeding was pending as to some of the appellees until January, 1937, more than a year and a half after their lands were condemned.

Oregon laws further provide that every complaint shall contain a demand for the relief claimed. The relief claimed in the petition in this case is stated in paragraph 8 of the petition (R. 18-19), where it is asked that the Court "appoint commissioners to appraise and fix the value of the lands and the amount of compensation, * * * and make just distribution of the estimated and final award among those entitled thereto as expeditiously as possible."

Under the Oregon practice, a land-owner in a condemnation case has the right of trial by a jury, and is

entitled to present evidence in court as to the reasonable and fair value of his lands. "Such action shall be commenced and proceeded with to final determination in the same manner as an action-at-law." *Section 37-402, Oregon Laws.*

There is no way, under the petition herein, for trial and determination of the fair value of the lands of these appellees. They have been deprived of their lands, and have received no compensation therefor.

If the court should hold that a jury trial can be had in the present proceeding, then a serious question would arise as to the issue to be tried under the pleadings. The record shows that in June, 1935, a Declaration of Taking and a Judgment on Declaration of Taking was filed in which the 3474.34 acres of land mentioned in the petition, "and together therewith all rights, title, claim and interest of the owners of said tracts to land lying within the Neal survey lines, etc." was adjudged condemned, and the title vested in the United States. That Declaration of Taking and Judgment still stands of record, and appellees' lands within the Neal meander line is included therein. Of course, appellees at any trial would seek compensation for such lands. The plaintiff at such trial would contend that the amended petition filed January, 1937 (R. 48.), definitely stated in paragraph 8 thereof (R. 52-53) that the Declaration of Taking of June, 1935, did not include any lands within the Neal meander line, and that the landowner should not be

compensated for the lake bed lands not included in the amended petition.

The amended petition could not change or amend the Declaration of Taking of June, 1935. If that Declaration of Taking included lands in the lake bed, only Congress could release or dispose of such lands after they became vested in the United States by the Declaration of Taking of June, 1935. Therefore, at any trial the question as to whether lake bed lands were included in the Declaration of Taking must be determined, and it should now be determined by this court, whether the Declaration of June, 1935, included lake bed lands.

The District Judge may have had this difficulty in mind as well as the right of trial by jury, and other questions involved herein, when he announced in open court, during a discussion as to whether the case should be set down for trial: *"Well, you know what is going to happen. The Government is not going to be here. At least, I know that."* (R. 91.)

Following this remark, the court on his own motion, as well as on motion of appellees, dismissed the whole badly involved proceeding.

In the statement of the court above quoted, the District Judge expressed the belief that the court and the attorneys then knew that the Government would not try the case at any time, and therefore thought

the case should be dismissed, and then made his order to that effect.

The Court Was Authorized by Rule 41(b), Rules of Civil Procedure, to Enter the Order Here in Question

As we have endeavored to show, the District Court was fully conscious, at the time the Order was entered, that this abortive proceeding had been pending for more than seven (7) years. It is implicit in the remarks of the Court quoted above, that the long series of cumulative delays on the part of United States has made it most apparent that the Government would not respond to the Court's Order upon the setting of a trial date, if one should be made. The Court obviously took judicial notice of the long delays in this and other phases of the Malheur Lake litigation which has now been pending in the District Court for upwards of nine years, and which is still pending.

It is urged that the Government appeared at the first call date after rendition of the Otley decision and stated that it "would have to be ready for trial if the case should be scheduled for hearing." (App. Br. p. 17.) The remark carries its own construction that the Government would reluctantly and under compulsion appear for trial, if the Court should insist upon it. The spirit of Rule 41(b), supra, would appear not to place the onus upon the Court to see to it, as a matter of affirmative action, that litigation be pressed to expeditious conclusion. A concise expression of

the Rule applicable here would appear to be that of the Tenth Circuit in *Sweeney v. Anderson,* 129 F. (2d) 756, at page 758, which is as follows:

> "The elimination of delay in the trial of cases and the prompt dispatch of court business are prerequisites to the proper administration of justice. These goals cannot be attained without the exercise by the courts of diligent supervision over their own dockets. Courts should discourage delay and insist upon prompt disposition of litigation. Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. *The duty rests upon the plaintiff* to use diligence and to expidite his case to a final determination. The decision of a trial court in dismissing a cause for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been a gross abuse of discretion."

Cited in support of the above Rule is the case of *Hicks v. Bekins Moving & Storage Company, Ninth Circuit,* 115 F. (2d) 406, among others.

The foregoing case of Hicks vs. Bekins Moving & Storage Company, of this Court, would appear from our research to be the leading case in definition of the circumstances under which the District Court is authorized to dismiss a cause for lack of prosecution. We request that the Court read this decision, in the light of the facts proferred by this record.

On the Contention of Estoppel

It is urged that these appellees are estopped to object to the validity of the Statute, based upon their

application, at one stage of the proceedings, for leave to withdraw certain moneys which had theretofore been deposited with the Clerk of the Court.

In response to this contention, we inquire, what Statute? We are not here confronted with an issue arising upon the validity of a Statute. It is true, too, as all parties admit, that the appellees have been deprived the use of their lands for seven years, and that the Government has enjoyed the use of such lands for that period without any compensation to the owners whatsoever. We find no basis in this circumstance for the contention that appellees have accepted benefits, nor are we able to apply the rule of *Great Falls Manufacturing Company vs. Attorney-General,* 124 U.S. 581, 598-600, cited at page 18 of appellant's brief, to the factual background presented by this record. To do so, we would be obliged to apply the quip of the Eastern Oregon wag who mused: "If we had some ham, we'd have ham and eggs, if we had the eggs."

Certainly the mere filing of an application for release of funds, an application which was denied, would not operate to set aside the Statutes of the United States, the Statutes of the State of Oregon, and the Rules of the Federal Courts.

It is respectfully submitted that the Judgment and

Order of the District Court should be sustained, for the reasons stated herein.

Respectfully submitted,

J. W. McCULLOCH,
EDWIN D. HICKS,
Attorneys for Appellees.

No. 10414

United States
Circuit Court of Appeals
For the Ninth Circuit.

JARMON THOMAS CONWAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10414

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Circuit Court of Appeals
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JARMON THOMAS CONWAY,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

WILLIAM H. CHESTER
Phoenix National Bank Building,
Phoenix, Arizona
Attorney for appellant.

FRANK E. FLYNN,
United States Attorney,

JAMES A. WALSH,
ELBERT R. THURMAN,
Assistant United States Attorneys,
U. S. Courthouse,
Phoenix, Arizona.
Attorneys for appellee. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States
For the District of Arizona.
C-6420 PHX

INDICTMENT

Violation 50 U.S.C. 311 (Selective Training and Service Act.)

United States of America,
District of Arizona—ss.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that on the 14th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Jarmon Thomas Conway, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Jarmon Thomas Conway, having been classified in Class IV-E by his local board, being Maricopa County Local Board No. 6, created and located in Maricopa County, Arizona, under and by virtue of the provisions of the Selective Training

and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been duly assigned by said board to work of national importance under civilian direction, and having been duly ordered and notified by said board to report for work of national importance under civilian direction, a copy of which said order and notice is in words and figures as follows, to-wit: [4]

"Local Board No. 6 81
Maricopa County 013
006
May 4, 1942
(Date of mailing

May 4 1942
213 E. Glendale Ave.
Glendale, Arizona
(Stamp of local board)

ORDER TO REPORT FOR WORK OF NATIONAL IMPORTANCE

The President of the United States,
To Jarmon (first name), Thomas (middle name), Conway (last name)
Home address Route 11, Box 1170, Phoenix, Arizona.
Order No. 1938

Greeting:

Having submitted yourself to a local board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940, as amended, as a conscientious objector to both combatant and noncombatant mili-

tary service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Civilian Public Service #31 Camp, located at Placerville, California, in the State of California.

The Selective Service System will furnish you transportation to the camp, provided you first go to your local board named above and obtain the proper instructions and papers.

You will, therefore, report to the local board named above at 9:30 A. M. (Time) on the 14th day of May, 1942. Local Board Address: 213 E. Glendale, Glendale, Ariz.

You will be examined at the camp for communicable diseases, and you will then be instructed as to your duties.

Wilful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your local board.

(signed) J. S. BRAZILL

Member of Local Board [5]

The action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, knowingly, wilfully, unlawfully and feloniously did fail and neglect to report to his said local board at 9:30

A. M. on the 14th day of May, 1942, or at any other time, for work of national importance under civilian direction, as he was required to do by said order.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney.

Indictment A true bill, Sam W. Seaney Foreman.

[Endorsed]: Filed Jan. 28, 1943 [6]

In the United States District Court
for the District of Arizona
October 1942 Term at Phoenix

MINUTE ENTRY OF WEDNESDAY,
FEBRUARY 17, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States
District Judge, Presiding
C-6420

[Title of Cause.]

Frank E. Flynn, Esquire, United States Attorney and James Walsh, Esquire, Assistant United States Attorney, appear for the Government. The Defendant, Jarmon Thomas Conway, is present in person with his counsel Wm. H. Chester, Esquire and now presents Motion to Quash Indictment. Argument is now had by counsel for the defendant, and

It Is Ordered that said Motion to Quash Indictment be and it is denied.

The defendant's plea is not guilty as charged in the indictment, which plea is now duly entered, and

It Is Ordered that this case be set for trial March 23, 1943 at ten o'clock a. m. [7]

In the United States District Court
For the District of Arizona

[Title of Cause.]

VERDICT

We, the Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find the defendant Jarmon Thomas Conway Guilty in the manner and form as charged in the indictment.

FRANK M. POOL,
Foreman.

[Endorsed]: Filed Apr 9, 1943 [8]

In the United States District Court
for the District of Arizona

C-6420 Phoenix

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JARMON THOMAS CONWAY,

Defendant.

JUDGMENT

Due proceedings having been had on the indictment filed herein presented against the defendant above named charging a violation of Title 50, United States Code, Section 311;

It Is Ordered, Adjudged and Decreed that said defendant is guilty of said crime and in punishment thereof that said defendant be committed to the custody of the Attorney General of the United States or his duly authorized representative for imprisonment in such place of confinement as the said Attorney General shall designate for a term of three (3) years;

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

Dated at Phoenix, Arizona, this 19th day of April, 1943.

DAVE W. LING
Judge

[Endorsed]: Filed Apr 19 1943 [9]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Jarmon Thomas Conway, Glendale, Arizona.

Name and address of Appellant's Attorney: W. H. Chester, 412 Phoenix Nat'l Bank Building, Phoenix, Arizona.

Offense: Violation of Title 50 U. S. C. Section 311 (Selective Training & Service Act).

Date of Judgment: April 19, 1943.

Brief description of Judgment and Sentence: Verdict of guilty returned on April 9, 1943, of failing and neglecting to report as a Conscientious Objector for civilian work of national importance when notified so to do by his local Selective Service Board. Sentence of three years in Federal Penitentiary made and entered April 18, 1943.

Name of prison where confined if not on bail: On bail.

I, the above-named appellant, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment above-mentioned upon the grounds set forth below.

JARMON THOMAS CONWAY
Appellant.
W. H. CHESTER
Attorney for Appellant. [10]

GROUNDS FOR APPEAL

I.

That the verdict is contrary to law.

II.

That the verdict is contrary to the weight of the evidence.

III.

That the court erred in the decision of matters of law during the course of the trial.

IV.

That the Court erred in matters pertaining to procedure and evidence during the course of the trial.

V.

That the Court erred in sustaining objections to evidence offered by Appellant during the course of the trial.

VI.

That the Court erred in overruling objections to evidence offered by the United States Attorney during the course of the trial.

VII.

That the court has misdirected the jury on a matter of law.

VIII.

That the Court erred in refusing to give instructions to the jury as requested by the defendant.

IX.

That the Court erred in that Title 50 U.S.C. Section 311 as construed and applied by the trial Court violates the Fifth Amendment to the United States Constitution and deprives the Appellant of liberty and property without due process of law and without opportunity to be heard.

X.

That Title 50 U.S.C. Section 311 as construed and applied by the trial court violates the First and Fourteenth [11] Amendments to the United States Constitution, and deprives the defendant of freedom of religion and due process of law.

XI.

That Title 50 U.S.C. Section 311 as construed and applied by the trial court violates the Thirteenth Amendment to the United States Constitution, and under such construction it subjects the defendant to involuntary servitude.

Respectfully submitted
W. H. CHESTER
412 Phoenix Nat'l Bank Bldg.
Phoenix, Arizona,
Attorney for Appellant.

Received copy April 19, 1943.
E. R. THURMAN
Asst. U. S. Attorney.

[Endorsed]: Filed Apr. 19, 1943. [12]

[Title of District Court and Cause.]

APPEAL BOND

United States of America
District of Arizona—ss.

Be it Remembered, that on this 19 day of April, 1943, the Honorable Dave Ling, Judge of the District Court of Arizona, personally came Jarmon Thomas Conway, Principal and National Automobile Insurance Company as surety and jointly and severally acknowledge themselves to owe the United States of America the sum of One Thousand Two Hundred Fifty and no/100 ($1250.00) Dollars, to be levied on their goods and chattels, lands and tenements, if default be made in the conditions hereinafter set forth.

Whereas, lately in the April, 1943 term of the District Court of United States for the District of Arizona in a suit pending in said Court between the United States of America as plaintiff and Jarmon Thomas Conway as defendant, a judgment and sentence was rendered against said Jarmon Thomas Conway and said Jarmon Thomas Conway has taken an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in aforesaid suit, and notice of said appeal having been filed with the clerk of the District Court of United States for the District of Arizona and a copy of said appeal served on the United States Attorney for the District of Arizona

in manner and within time required by law and rules of court in such cases made and provided.

Now the Condition of This Recognizance is such that if [13] Jarmon Thomas Conway shall appear in the United States Circuit Court of Appeals for the Ninth Circuit in San Francisco, State of California on such day or days as may be appointed by said Court, and upon such day or days as may be appointed by said Court until finally discharged therefrom and shall abide by and obey all orders of the Circuit Court of Appeals and surrender himself in execution of judgment and sentence of the District Court of the United States for the District of Arizona if said judgment against him shall be affirmed by the United States Circuit Court of Appeals for the Ninth Circuit and shall prosecute his appeal to effect and shall pay all taxable costs on appeal if he fails to make his appeal good, then the above obligation to be void, otherwise it shall be and remain in full force and effect.

And the surety or sureties in this obligation hereby covenants and agrees that in case of breach of any of the conditions of this bond, the United States District Court for the District of Arizona may upon notice to said surety or sureties of not less than ten days, proceed summarily in this cause to ascertain the amount of costs in the Circuit Court of Appeals for the Ninth Circuit, which said surety or sureties is bound to pay on account of such breach and render judgment therefor against said surety or sureties and to order execution therefor.

Judgment and sentence in this cause was entered on April 19, 1943 against Jarmon Thomas Conway on a charge of having, on or about the 14th day of May, 1942, unlawfully and in violation of Section 311, Title 50 of the United States Code, failing and neglecting to report as a conscientious objector for civilian work of national importance when notified so to do by his local Selective Service Board at Glendale, Arizona, contrary to the form of the statute in such cases made and provided and [14] against the peace and dignity of the United States of America.

Sealed with our seal and dated this 19 day of April, in the year of our Lord, 1943.

JARMON THOMAS CONWAY
Principal.
NATIONAL AUTOMOBILE
INSURANCE COMPANY
A California Corporation.
By ED GROVES,
Attorney-in-Fact.

Approved this 21 day of April, 1943.
DAVE W. LING.

[Endorsed]: Filed Apr. 21, 1943. [15]

In the United States District Court
For the District of Arizona
April, 1943, Term at Phoenix

MINUTE ENTRY OF SATURDAY,
MAY 15, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

No. C-6420 Phoenix.

[Title of Cause.]

James A. Walsh, Esquire, Assistant United States Attorney, appears as counsel for the Government. Wm. H. Chester, Esquire, is present on behalf of the defendant. On motion of said counsel for the defendant,

It Is Ordered that defendant's time to file Bill of Exceptions herein be extended to and including June 9, 1943. [16]

[Title of District Court and Cause.]

BILL OF EXCEPTIONS.

Be it Remembered that in the District Court of the United States, for the District of Arizona, the Honorable Dave W. Ling, Judge of said Court presiding, and Frank E. Flynn appearing as attorney for plaintiff and W. H. Chester appearing as attorney for the defendant, the following proceedings were had:

That on the 17th day of Feby., 1943, the defendant filed the following Motion to Quash Indictment:

"(Title of Court and Cause)

Comes now the defendant above named and moves the Court to quash the indictment in the above numbered cause for the reasons hereinafter stated:

I.

That the indictment fails to state facts sufficient to constitute a crime or offense against the United States.

II.

That the indictment fails to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the selective service system or that it acted in accordance with the Selective Service Act and the provisions thereunder.

III.

Indictment fails to show that the defendant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System.

IV.

That the defendant herein has been heretofore tried before [17] this court for the same offense charged herein and that this indictment *(constites)* double jeopardy.

W. H. CHESTER,
Attorney for Defendant,
412 Phoenix Nat'l Bank Bldg.
Phoenix, Arizona.

POINTS AND AUTHORITIES

There are no facts alleged in the indictment to show that the defendant was required under the provisions of the Selective Service Act to report as the Glendale, Arizona local board ordered. Nor were there any facts alleged to show that the defendant properly came under classification and orders of the said board.

50 U.S.C.A. Section 303 (g).

Every fact necessary to constitute the crime charged must be directly and positively alleged and nothing can be charged by implication or indictment.

U.S. vs. Britton, 107 U.S. 655;
U.S. vs. Cruikshank, 92 U.S. 542.

Omission from the indictment of any fact or circumstance necessary to constitute an offense will be fatal.

Harris vs. U. S., 104 Fed. (2nd) 41.

Indictement is so indefinite and uncertain that the defendant cannot properly raise the Constitutionality of the Statute and is so indefinite and uncertain as not to provide a reasonable standard of guilt or innocence.

Indictment is in contravention of the 5th and 13th Amendments of the Constitution of the United States of America.

W. H. CHESTER,
Attorney for Plaintiff.

That on the 17th day of February, 1943, said motion came on to be heard and on the 17th day of

February, 1943, the Honorable court entered its order denying said motion to quash the indictment.

[18]

That on the 9th day of April, 1943, upon the trial of said cause

THOMAS B. RIORDAN

was called as a witness on behalf of the plaintiff and testified as follows:

"Q. What is your business or occupation?

A. Clerk of the Selective Service Board, Local Board No. 6, Glendale, Arizona.

Q. Who has custody of the books and records of the Local Board. A. I do.

Q. As Secretary? A. Yes, sir.

Q. Mr. Riordan, handing you Government's Exhibit No. 1 for identification, I will ask you if that is a part of the records of your board?

A. Yes; it is.

Q. Do you know whose signature appears at the bottom there?

A. Yes, sir, the signature of the defendant Jarmon Thomas Conway.

Q. And at the time this exhibit was received by your Board, was this pencil line on it?

A. No, it was not.

Q. Do you know where that line came from?

A. That was put on there at a later date by clerk, Mrs. Stoddard.

Q. And this line here in pen and which has now been run through, was that on it?

(Testimony of Thomas B. Riordan.)

A. No; it was not.

Q. Do you know where that came from?

A. That was put on at a later date by the Clerk, Mrs. Stoddard.

Mr. Walsh: We offer it in evidence.

Mr. Chester: I'd like to ask Mr. Riordan a question on voir dire, your Honor.

The Court: Yes.

Mr. Chester: Q. Mr. Riordan, are you well acquainted with the signature of Jarmon Conway?

A. I have seen him—I know his signature, yes, sir. I have seen him write it. [19]

Q. How often have you seen him?

A. I saw him write it once.

Q. Once? A. Yes, sir.

Mr. Chester: I object, your Honor. I don't believe the man is qualified to recognize the signature after seeing it at one time.

Mr. Walsh: Well, it is admissible as a part of the records of the Board in any event, your Honor. He has testified that he is the custodian of it and it is a part of the records of the Local Board.

The Court: Yes.

Mr. Chester: He testified he knew the signature. I have no objection to its being in evidence, I have no objection to the exhibit to that effect.

The Court: Well, it may be received:

(Thereupon on April 9, 1943, plaintiff proposed and offered in evidence the following paper:)

(Testimony of Thomas B. Riordan.)

"GOVERNMENT'S EXHIBIT 1.

"Serial Number 1817. Jarmon Thomas Conway. Order No. 1838. Address R. R. 11 Box 1170, Phoenix, Maricopa, Ariz. Age 21 years. Place of Birth Coffman Co. Texas. Country of Citizenship U. S. A. Date of Birth Jan 6, 1918.
Name of person knowing address;
Mr. Frank M. Richardson, Brother in law R. R. 11, Box 1170 Phoenix, Maricopa, Arizona.
Employer: Norman Nursery: Place of Employment 2508 N. Central, Phoenix, Maricopa, Arizona.
I affirm that I have verified above answers and that they are true.

JARMON CONWAY.

(Back side of Card)

"Description of Registrant
Race, White Height 6 Ft. Weight 160.
Complexion Ruddy. Eyes Brown. Hair Brown.
Signed by registrar Ethel Harper, October 16, 1940."

And the said Thomas B. Riordan further testified for the plaintiff as follows:

By Mr. Walsh:

Q. Mr. Riordan, I hand you Government's Exhibit No. 2, for identification, and ask you if that is a part of the records of your Board.

A. Yes; it is. [20]

Q. And it is a record required to be kept by

(Testimony of Thomas B. Riordan.)

your Board under the Selective Service Rules and Regulations? A. Yes; it is.

Q. Who is the Chairman of the Board?

A. Mr. J. S. Brazill.

Q. Are you acquainted with his handwriting?

A. I am.

Q. Is that his signature that appears on the first page of it.

A. Yes; that is his signature.

Mr. Walsh: We offer it in evidence.

Mr. Chester: No objection.

(Thereupon the following paper was offered and proposed in evidence by the plaintiff:)

GOVERNMENT'S EXHIBIT 2 IN EVIDENCE

(This exhibit being a Selective Service Questionnaire of Jarmon Conway, gives the following answers to the questions therein in substantially the form as follows:

Name: Jarman Thomas Conway,

Residence: R 11 Box 1170, Phoenix, Maricopa, Arizona.

Social Security Number 526-14-4949.

I have physical or mental defects or diseases.

Slightly hard of hearing. I have completed 7 years of elementary school and 0 years of high school.

I am working at present time.

The job I am working at now is nursery man.

My duties are plant shrubbery, grade lawns, etc.

(Testimony of Thomas B. Riordan.)
I have done this kind of work for 2 years.
My average weekly earnings in this job are $14.00.
In this job I am an employee, working for salary, wages, commission or other compensation.
My employer is Norman Nurseries, 2508 N. Central Avenue, Phoenix, Arizona, whose business is Nursery Business.
Other business or work in which I am now engaged is preaching the gospel.
I am licensed as truck and tractor driver.
I am not an apprentice.
I have also worked at the following occupations other than my present job, during the last 5 years.
Farmer, Raising cotton, 1936 to 1937.
Nursery Man planting shrubs, Etc. 1937 to 1941.
I am single.
I have no children.
I am a minister of religion.
I do customarily serve as a minister.
I have been a minister of the Jehovah's witnesses since October, 1938. [21]
I have not been formally ordained.
I am not a student preparing for the ministry in a theological or divinity school.
I was born at Tarrell, Texas, Kaufman (County).
I was born on January 6, 1919.
My race is white.
I am a citizen of the United States.

(Both paragraphs for conscientious objectors as to combatant and noncombatant service were checked by registrant.)

(Testimony of Thomas B. Riordan.)
I have not been convicted of treason or a felony.
Signed June 3, 1941 by Jarman Thomas Conway,
Subscribed and sworn to before Adam Abet, Notary Public.
Minutes of Action by Local Board.
The Local Board Classifies the Registrant in class 4 Subdivision E, by the following vote: Ayes 3, Noes None. 10-28-41.

J. F. BRAZILL,
Member.

Appeal to Board of Appeal.

I hereby appeal from the classification by the Local Board in Class 4 Subdivision E 11-7-41.

JARMON T. CONWAY,
Signature of person appealing.

Minutes of action of Board of appeal. The Board of Appeal classifies the registrant in Class IV, subdivision E by the following vote Ayes 5 noes 0, January 23, 1942.

BLAINE B. SHIMMEL,
Chairman.

MINUTES OF OTHER ACTION

Nov 25, 1941. The Board of Appeal has this date reviewed the file of this registrant and determined that he should not be classed in IV (other than IV-E) Class III, Class II, or Class 1-H.

BLANE B. SHIMMEL,
Chairman, Board of Appeal.

(Testimony of Thomas B. Riordan.)

By Mr. Walsh:

Q. Can you tell us, Mr. Riordan, in a general way what the document which has been received as Government's Exhibit 2 in Evidence is?

A. That is known as the Selective Service Questionnaire. Those questionnaires are mailed to each registrant, being in numerical order, and the registrant is given ten days from the date of mailing that questionnaire for him to fill it out and return it to the Local Board. When it is returned to the Local Board properly filled out, the Local Board then, at one of its meetings takes the questionnaire, and from the information contained in the questionnaire they classify the registrant.

Q. Did the Local Board procure the report of a physical examination of the defendant Conway in this case? [22]

A. They did, yes, sir.

Q. Do you recall from whom they obtained that report?

A. It was—they obtained—the examination was made by Dr. Leff of Glendale.

Q. Are you acquainted with Dr. Leff?

A. Yes, sir.

Q. How long have you known him?

A. I have known him for ten or fifteen years.

Q. Have you seen him write and sign his name?

A. Many times .

Mr. Walsh: Mark this.

(The document was marked as Government's Exhibit 3, for identification.)

(Testimony of Thomas B. Riordan.)

Mr. Walsh: Q. I hand you Government's Exhibit 3 for identification and ask you if the signature of Dr. Leff appears thereon?

A. It does, yes, sir. It is on page 2 of the physical report .

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received in evidence as Government's Exhibit 3.)

And thereupon, the plaintiff offered in evidence the following paper:

"GOVERNMENT'S EXHIBIT 3 IN EVIDENCE

Report of Physical Examination

Conway, Jarmon Thomas, Order #1938 Race: White.

Occupation: Nurseryman,

Permanent address; Phoenix, Maricopa, Arizona,

Mother tongue; English.

Birthplace Terrell, Texas. Date of Birth January 6, 1919.

STATEMENT OF PERSON EXAMINED

Have you had any experience in CCC work. No.

Do you consider that you are now sound and well? Yes.

What illness, disease, or accidents have you had since childhood? None except frequent colds.

Have you ever had any of the following? If so give dates; Sepples of unconsciousness, convulsions, or fits? No. Gonorrhea No. Sore Penis No. Are

(Testimony of Thomas B. Riordan.)

you addicted to the use of habit forming drugs or narcotics? No.

Have you ever raised or spat up blood? No. [23]

When were you last treated by a physician, and for what ailment? Never.

Have you ever been treated at a hospital or asylum? No.

I certify that the foregoing question and my answers thereto have been read over to me; that I fully understand the question, and that my answers thereto are correctly recorded and true in all respects. I further certify that I have been fully informed and know that making or being a party to making any false statement as to my fitness for military service renders me liable to punishment by fine and imprisonment.

(Signed) By JARMON THOMAS CONWAY.
October 25, 1941.

This local Board finds the person named above is Qualified for general military service 4 E.

J. F. BRAZILL,

Date 10/28/41.

PHYSICAL EXAMINATION BY PHYSICIAN

1. Eye abnormalties. Pterggri.
2. Ear, nose, throat abnormalties chronic Phargngity.
3. Mouth and gum abnormalties. None apparent. Teeth.
5. Skin OK.

(Testimony of Thomas B. Riordan.)

6. Varicose Veins. None.
7. Hernia. None.
8. Hemorrhoids. None.
9. Genitalia OK.
10. Feet OK.
11. Musculo skeletal defects none.
12. Abnoramal viscera OK.
13. Cardiovascular system OK.
14. Lungs, including X-ray if made OK.
15. Nervous system reflexes pupillary OK Patellar OK.
16. Endocrine disturbances none apparent.
17. Blood test (slip attached Laboratory report of Serological Blood Test-Klein Neg.

Vision:

Right eye 20/20.
Left eye 20/20.

Hearing:

Right ear 20/20.
Left ear 20/20.

Height 70 in.
Weight 152 lb.
Girth (at nipples:
Inspiration 40½ In.
Expiration 38 in.
Girth (at unbilicus) 29½ In.
Posture OK.
Frame OK.
Color of hair Blond.
Color of eyes Brown.
Complexion Ruddy. [24]

(Testimony of Thomas B. Riordan.)

Pulse:

Sitting 72.

After exercise 120.

2 Min. after exercise 72.

Blood Pressure

Systolic 130.

Diastolic 70.

Urinalysis Sp. Gr. 1005.

Albumin neg.

Sugar Neg.

I certify that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is

Qualified for general military service.

Place; Glendale, Arizona, Date October 25, 1941.

(Signed) M. I. LEFF, M.D.,

Examining Physician".

And the said witness Riordan testified further as follows:

By Mr. Walsh:

Q. Directing your attention to the first page of Government's Exhibit No. 3 in evidence, I will ask you if you know whose signature that is on the first page there.

A. That is the signature of J. S. Brizill, our Chairman of Local Board No. 6 at Glendale.

Q. Would you read the language appearing immediately above his signature there?

(Testimony of Thomas B. Riordan.)

A. "This Local Board finds that the person named above is qualified for general military service 4-E. Date 1028-41. J. S. Brizill, member of Local Board".

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 4 for identification.)

Mr. Walsh: Q. Mr. Riordan, I hand you Government's Exhibit No. 4 for identification, and I will ask you if that is a part of the records of your Board? A. Yes; it is.

Q. Is it a record required to be kept by the Board by the Selective Service Regulations?

A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 4 in evidence.) [25]

GOVERNMENT'S EXHIBIT 4 IN EVIDENCE

Special Form for Conscientious Objectors:

(Government's Exhibit 4 being regular form filled in by defendant, to which he made the following answers to the following questions substantially as set out therein.)

Name: Jarmon Thomas Conway: Route 11 Box 1170, Phoenix, Maricopa, Arizona.

1. Describe the nature of your belief which is the basis of your claim made in series 1 above.

The nature of my belief is fully explained by the ar-

(Testimony of Thomas B. Riordan.)

ticles attached which are publications by Watchtower Bible & Tract Society, of which I am a member. My allegiance is pledged entirely to Jehovah God and Christ Jesus; as they have no part in armed conflicts of this world neither can their servants of which I am consecrated to be one.

2. Explain how, when, and from or from what source you received the training and acquired the belief which is the basis of your claim made in series I above.

From the Holy Bible and from publications of Watchtower Bible & Tract society explanatory thereof.

3. Give the name and present address of the individual upon whom you rely most for religious guidance.

I do not rely upon any individual for spiritual guidance, only thru Jehovah and Christ Jesus.

4. Under what circumstances, if any, do you believe in the use of force?

Only at the command of Almighty God or his Theocratic King, Christ Jesus.

5. Describe the actions and behavior in your belief which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions.

I have for three years preached the Gospel of the Kingdom of Jehovah God from door to door, as Christ Jesus did. I have done this regularly since October, 1939.

6. Have you ever given public expression, written or oral, to the views herein expressed as the basis

(Testimony of Thomas B. Riordan.)

for your claim made in series I above. If so specify when and where.

Yes. I have, as above stated, given public expression since engaging in this work. I have gone from door to door in Phonix and vicinity preaching the word of Jehovah and distributing written bible phrophesy. This is done at the command of Jehovah. Matt 24:14.

1. Name and address of each school and college which I have attended:

Tona Rural School, Elementary, Located Tona Texas 1929 to 1931. Portia Rural School, Elementary, Portria, Texas, 1931 to 34. Dixie Consolidated Grade School, Tyler, Texas, 1934, 1936. [26]

2. Chronological list of all occupations, in which I have been engaged:

Farm Work, Employer, Arthur W. Conway, Father, Rt 11 Box 1170 1936.

Farm Work Employer Chas. Pearson, Paducah, Texas, 1936 to 1937.

Farm Work J. C. Rodgers, 20th and Campbell Ave. 1937 to 1938.

Farm Work, Norman Nurseries, 2508 N. Central, Phoenix, 1938 to 1941.

3. Addresses and dates of residence where I have formerlly lived:

Terrell, Texas Street, None 1919 to 1931.

Tyler Texas Street none 1931 to 1936.

Paducah Texas Street none 1936 to 1937.

(Testimony of Thomas B. Riordan.)
Phoenix, Arizona, R 11 Box 1170 1937 to 1941.
4. Name, address and country of birth of parents:
Walter Arthur Conway, Father, living born Texas, U. S. A.
Ollie Dace Conway, Mother, living, born Texas, U. S. A.
Participations in organizations. None.
2. Are you a member of a religious sect or organization. yes.
State the name of the sect, and the name and location of its governing body or head if known to you;
Jehovah's Witnesses, which are a Christian group engaged solely in the dissemination of bible truths.
When, where, and how did you become a member of said sect or organization.
I became a member thru diligent study of the Bible and publications explaining the same and convinced myself and now publish this gospel. Phoenix, Arizona, October, 1939.
State the name and location of the church, congregation, or meeting where you customarily attend.
Kingdom Hall where studies are held is located at 1216 West Washington, St., Phoenix, Arizona.
Give the name and present address of the pastor or leader of such church, congregation, or meeting.
V. Lee Potter, company servant, Local company Jehovah's Witnesses.
Describe carefully the creed or official statements of said religious sect or organization in relation to participation in war;
We have no official statement of creed. The bible

(Testimony of Thomas B. Riordan.)

which is my guide commands us to render our services fully unto Jehovah God.

3. Describe your relationships with and activities in all organizations with which you are or have been afilliated, other than religious or military.

None. [27]

Give here the name and other information indicated concerning persons who could supply information as to the sincerity of your professed convictions against participation in war.

V Lee Potter, Box 2343 Phoenix, Minister, relationship to me none.

F. M. Richardson R 11 Box 1170 Phx Nurseryman, Bro-in-law.

J. C. Stefer, Mission Drive & 19th Ave Nurseryman, relationship to me. none.

Signed by Jarmon Thomas Conway,

Subscribed and sworn to before Adam Abet, Notary Public, June 3, 1941."

Thereafter Riorden testified as follows:

Mr. Walsh: Q. Mr. Riordan, with reference to Government's Exhibit No 4 in evidence, can you tell us in a general way what that exhibit is?

A. This is what is known as a D.S.S. form 47. It is a special form for conscientious objectors. In other words, when a man claims he is a conscientious objector he requests that we given him this form. Or he can go into any local board nearest to where he is and request that Board to give him that form 47, and they, in turn, will be glad to give it to him

(Testimony of Thomas B. Riordan.)

and then he fills out all of the information asked for on the form and returns it to the Local Board. The information here is in regard to his church that he belongs to and all the information showing why that man is a conscientious objector, why he claims to be a conscientious objector. The Board then reviews this form and the evidence contained therein, and if they feel satisfied with the information there that the man is a conscientious objector, why, then they grant his request and place him in a classification which is given a conscientious objector.

Q. And that particular form was filed by the defendant Conway with your Board in this case?

A. Yes, this was filed by him in his case, and it was properly signed and acknowledged.

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 5 for identification.)

Mr. Walsh: Q. I hand you Government's Exhibit No. 5 for identification, and ask you if that is a part of the records of your Board?

A. Yes; it is.

Q. And was the entire exhibit received all at one time, and as one document?

As I recall, it was, yes, sir; it all came in together.

[28]

Mr. Walsh: We offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 5 in evidence)

Which exhibit is as follows:

(Testimony of Thomas B. Riordan.)

GOVERNMENT'S EXHIBIT 5 IN EVIDENCE

"Phoenix, Arizona, June 3, 1941.

Dear Sirs:

Please consider the information inclosed I desire to be classed in 4-D. The plase of a regular minister. If you don't see fit to put me in class 4-D. Please send me the appeal papers.

Truly yours,

JARMON T. CONWAY.

Route 11 Box 1170,

Phoenix, Arizona.

(to which letter was attached:)

A pamphlet entitled "Neutrality" published by Watchtower Bible and TractSociety, Inc., International Bible Students Association, Brooklyn, New York.

And

Affidavit by V. Lee Potter to the effect that Jarmon Thomas Conway is actively engaged in preaching the gospel and discharging the duties of a regular minister of Religion. That he had been a Jehovah's witness since the month of October, 1939, and

Three pages of printed matter designated "An important letter to the Department of Justice, dated October 9, 1940)."

And thereafter said witness Riordon testified further:

Mr. Walsh: Q. Directing your attention to the last page of Government's Exhibit No. 2 in evi-

(Testimony of Thomas B. Riordan.)

dence, Mr. Riordan, can you tell me whose signature appears under the place marked "Minute of Action?"

A. That is the signature of J. S. Brizill, Chairman of Local Board No. 6 at Glendale, Ariona.

Q. And the entries immediately above it, do you know by whom that was made?

A. I made that.

Q. By whose authority?

A. By the authority of the Local Board at Glendale. [29]

Q. And the date that it bears, do you know who endorsed that on there? A. I did.

Q. By what authority?

A. By the authority of the Local Board.

Q. From the minutes, those minutes, Mr. Riordan, can you tell us what classification the defendant Conway received?

A. He was given classification of a conscentious objector, Class 4-E.

Q. And on what date?

A. On October 28th, 1941.

Q. Was that classification given at a regular meeting of Local Board No. 6?

A. Yes; it was.

Q. Were you present at the meeting?

A. I was.

Q. And do you know whether or not the entire file of the defendant Conway was then before the Board?

A. Yes; the entire file—everything that we had

(Testimony of Thomas B. Riordan.)

received from Mr. Conway or any other source pertaining to his case was in his cover sheet, and the cover sheet—the entire cover sheet was before the Board at the time.

Q. Did it include Government's Exhibit No. 2, which you have before you.

A. Yes; it did.

Q. And Government's Exhibit No. 3, which is his physical examination? A. It did.

Q. Did it include Government's Exhibit No. 4, which is the form of the conscientious objector?

A. Yes; it did.

Q. And did it include Government's Exhibit No. 5, which is the letter and attached document which have just been admitted into evidence?

A. Yes, sir; it did.

Q. Was any consideration given to the question of classifying the defendant Conway as in 4-D?

A. Yes, sir.

Q. And what discussion was had on that particular question? [30]

A. Well, 4-D is a classification given to a minister, and the defendant claimed that he was a minister of the Jehovah Witnesses. At that time we had a list in our office that was furnished us by our headquarters and to our headquarters from the National Headquarters, a list showing all the ministers of the Jehovah Witness Sect, and that list was furnished by the Jehovah Witnesses themselves to the National Headquarters, and upon checking that list we could not find Mr. Conway's name on

(Testimony of Thomas B. Riordan.)

it as being a minister, so, therefore, the Board denied him—that is, denied his plea as that of a minister, and put him in Class 4-E because he did not appear on their list as a minister.

Q. Class 4-E is the classification of a conscientious objector?

A. That is. They recognized that he was a conscientious objector and they put him in that class.

Q. After the defendant had been classified in 4-E did you see him? A. Yes, sir.

Q. And where did you see him?

A. He came into the office.

Q. Do you remember what date it was, approximately? A. No, I don't.

Q. After he had been classified 4-E did you send him a notice. A. Yes, sir.

Q. Of his classification? A. Yes, sir.

Q. And was it subsequent to the time when you mailed him that notice that he came in?

A. Yes, sir.

Q. And that would be about when, to the best of your recollection?

A. Well, I'd have to check up to see what date we mailed that. It was some time after his classification as 4-E.

(A book record was furnished the witness)

The Witness: We mailed him his classification card on October 29th, 1941, and it was on or about the 7th day of November that he was in the office again.

(Testimony of Thomas B. Riordan.)

Q. And did you have any conversation with him at that time?

A. Yes. He came in and stated that he wished to appeal, make an appeal from his classification.

[31]

Q. And directing your attention to the last part of the page on the questionnaire there, does his signature appear thereon. A. Yes, it does.

Q. And was it signed in your presence?

A. It was, yes.

Q. Will you read the part appearing immediately above his signature?

A. It is "Appeal to Board of Appeal. I hereby appeal from the classification by the Local Board in Class 4, Sub-division E. 11-7-41." The signature of the person appealing: "Jarmon T. Conway."

Mr. Walsh: May this be marked as an exhibit?

(The document was marked as Government's exhibit 6 for identification).

Mr. Walsh: Q. I hand you Government's Exhibit No. 6. for identification, and ask you if they are a portion of the records of your Local Board in this case? A. Yes; they are.

Mr. Walsh: I offer them in evidence.

Mr. Chester: No objection.

(The documents were received as Government's Exhibit 6 in evidence)

Being as follows:

(Testimony of Thomas B. Riordan.)

GOVERNMENT'S EXHIBIT No. 6
IN EVIDENCE

"Phoenix, Arizona, Route 11, Box 1170, November 7, 1941.

Selective Service Board No. 6,
Glendale, Arizona.

Dear Sir:

I, Jarmon Thomas Conway, desire to appeal from my classification of 4E and wish to be properly classed as I suggested in my questionnaire, as that of an Ordained minister D4. I should like to call to your attention that Section XXX, paragraph 385 Vol. 3, particular paragraph 5 in which according to General Hershey, I should be classed as 4D.

As new evidence I present a copy of consolation magazine of July 9, 1941, of which I call your attention pages 22 and 25.

Asking your cooperation on this matter that I might enjoy my full rights.

Respectfully yours,
JARMON T. CONWAY."

And attached to the letter was:

"Phoenix, Arizona, Route 11 Box 1170, November 19, 1841.

I, Thomas Jarmon Conway, as one of Jehovah's Witnesses, claim exemption from training and service and the classification of 4D as a duly ordained minister of religion under section five D, Selective Training and Service Act 1940 paragraph 360 selective service and [32] which reads as follows: (See paper inclosed)

(Testimony of Thomas B. Riordan.)

I should have classification 4D according to the facts and statements that I have sent the local draft board Glendale, Arizona. As I go from door to door, street magazine distribution, and also have part in Model Bible studies I should have the classification 4-D. Further proof is cited from the Scriptures: "The spirit of the Lord God is upon me; because the Lord hath anointed me to preach good tidings unto the meek he hath sent me to bind up the broken hearted, to proclaim liberty to the captives, and the opening of prisons to them that are bound; to proclaim the acceptable year of the Lord and the day of vengance ofour God and to comfort all that mourn" (Isa. 61:1&2) also "This gospel of the Kingdom must be preached unto all nations as a witness and then shall the end come" Matt 24:14. I have kept nothing back from you that was profitable unto you, but have shwed you and taught you publickly and from house to house (Acts 20:20) Signed by Jarmon T. Conway. Subscribed and sworn to before Adam Abet, Notary Public.

And to which letter was also attached:

Four pages of printed matter designated as Vol III Opinion No. 14, National Headquarters Selective Service System: Subject Ministerial status of Jehovah's Witnesses.

Signed by Lewis B. Hershey, Deputy Director, dated June 12, 1941."

(Testimony of Thomas B. Riordan.)

And Witness Riordan thereafter testified as follows:

Mr. Walsh: Q. I believe you testified awhile ago, Mr. Riordan, that you had checked a list of the ministers of Jehovah's Witnesses in your office at Glendale? A. Yes, sir.

Q. Did you on behalf of the Board, make any further investigation as to whether or not the defendant Conway was on any list of ministers of the sect known as Jehovah's Witnesses?

A. Yes; I did.

Q. What did you do in that regard?

A. Well, I *though* maybe that there might be a revised list or there might be a later list that his name would appear on, so I called our State Headquarters to ask them whether or not they had a list down there of—a revised list of Jehovah Witness ministers, and asked them to check their list to ascertain whether or not Jarmon Thomas Conway was on that list, listed as a minister.

Q. Did you receive any report from your State Headquarters in that regard?

A. I did, yes, sir.

Mr. Walsh: May this be marked? [33]

(The document was marked as Government's Exhibit 7 for identification)

Mr. Walsh: Q. I hand you Government's Exhibit 7 for identification and ask you if that is the report which you received?

A. Yes; that is the report that I received from our State Headquarters.

(Testimony of Thomas B. Riordan.)

Q. And this is a part of the Local Board's file in relation to this defendant? A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Well, your Honor, I object to this particular letter here as immaterial. The question qualifying a man, whether he is a minister or not does not depend whether his name is shown on the list. In accordance with your Exhibit No. 6, Opinion No. 14 of the Selective Service Board, there is nothing in that opinion that shows a man has to appear on that list.

Mr. Walsh: It certainly goes, your Honor, to the question as to whether or not the Board gave him a hearing and what the Board attempted to do in order to decide the thing fairly.

The Court: There would have to be some way of determining whether a man is a minister. Everyone selected under the Selective Service Act would say, "I am a minister, I don't have to go to war", and that would end it.

Mr. Chester: There is nothing in here that says a man is not a minister.

Mr. Walsh: Maybe the court should see the letter.

The Court: Well, it depends on somebody else other than the individual to determine whether he is a minister or not. I say, anybody selected under the Act would say, "I am a minister," and that would end it. It wouldn't make any sense. It may be received.

Mr. Chester: Exception:

(The document was received as Government's Exhibit 7 in evidence).

(Testimony of Thomas B. Riordan.)

Being as follows:

GOVERNMENT'S EXHIBIT NUMBER 7 IN EVIDENCE

(Being a letter from A. M. Tuthill, State Director Selecter service, to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona; and reads as follows:

"Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System" [34]

Thereafter Witness Riordan testified as follows:

Mr. Walsh: Q. Mr. Riordan, after the defendant Conway had filed with the Board notice of appeal that you have identified, was his file thereafter forwarded to the Board of Appeals?

A. It was, yes, sir.

Q. Where is that board located?

A. That Board is located at 318 Professional Building. It was located at 318 Profession Building at that time.

Q. That is, the Board of Appeals of this State?

A. That is where we mailed the file. That is our State Headquarters.

Q. And what was mailed to the Board?

(Testimony of Thomas B. Riordan.)

A. Everything in the man's cover sheet.

Q. Including all of the letters, documents and records which you have introduced here as exhibits?

A. Everything pertaining to this man's case. Every note and memorandum that was made was in that cover sheet and everything was forwarded to the Board of Appeals.

Q. And did you thereafter receive the file back from the Board of Appeals? A. Yes; we did.

Q. Directing your attention to the last page of Government's Exhibit No. 2 in evidence, I will ask you if there appears thereon any endorsement made by the State Board of Appeals?

A. Yes, there are just——

Q. (Interrupting) And would you read that, please?

A. It says: "Minutes of Action by Board of Appeal. The Board of Appeal classifies the registrant in class 4, sub-division E, by the following vote: Ayes 5, Noes none. January 23, 1942. Blaine B. Shimmel, Chairman."

Q. Did you thereafter notify the defendant Conway concerning the continuance of his classification under Class 4-E? A. Yes, we did.

Q. How did you so notify him?

A. By a card. There is a card that we have that states on it that you are continued in Class 4-E by the Board of Appeal—by vote of five to nothing, and that is mailed to his address notifying him.

Q. And did you notify the National Headquarters

(Testimony of Thomas B. Riordan.)

that the defendant Conway had been continued in Class 4-E? [35]

A. Well, we didn't notify him that he had been continued in Class 4-E. We notified them that he was in Class 4-E.

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 8 for identification).

Mr. Walsh: Q. I hand you Government's Exhibit No. 8 for identification, and ask if that is part of the records of your Board in this case?

A. Yes; that is.

Q. And can you tell us how it was received by the Board?

A. Well, D.S.S. Form 48 was made up by our Board notifying—it is a conscientious objector's report. This report is made, as I say, by our Board, and we mail it to the—our State Headquarters, and they, in turn, mail it to the National Headquarters. Form 49 is from the National Headquarters of the Selective Service System at Washington, D. C. It is an assignment to work of National importance. They assigned the registrant to a civilian public service camp and they—in that—this assignment they give us the camp that the registrant is to be assigned to, the place that the camp is, that and the date and hour that the man is to report to that camp.

Q. And was this received by your office from the State Headquarters?

(Testimony of Thomas B. Riordan.)

A. It was received by our office from the State Headquarters.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 8 in evidence)

And is as follows:

GOVERNMENT'S EXHIBIT No. 8 IN EVIDENCE

Assignment to Work of National Importance.

(Dated April 17, 1942, Registrant Jarmon Thomas Conway, assigned to work of national importance by order of LocalBoard will be delivered to: Camp Director of Civilian Public Service Camp No. 31, at Placerville, Eldorado County, California, on May 15, 1942.

Signed by Lewis B. Hershey, Director."

to which was attached carbon copy of Conscientious Objector report.

Showing Jarmon Thomas Conway, Classification IV-E,

Order No. 1938, Race White Age 22, occupation Nurseryman, Church affiliation Jehovah's Witnesses. In case of emergency notify: Frank M. Richardson, Relationship Brother-in-law- [36] Route 11, Box 1170 Phoenix, Arizona, Date November 1, 1941.

And thereafter Witness Riordan testified further:

Mr. Walsh: Q. Mr. Riordan, I hand you Govern-

(Testimony of Thomas B. Riordan.)

ment's Exhibit No. 9 for identification, and ask you if that is a part of the records of your Local Board?

A. Yes; it is.

Q. It is apparently a copy?

A. This is a copy of D.S.S. Form 50, which is an order to report for work of National importance.

Mr. Walsh: I offer it in evidence.

Mr. Chester: No objection.

(The document was received as Government's Exhibit 9 in evidence)

Which Exhibit was as follows:

GOVERNMENT'S EXHIBIT 9 IN EVIDENCE

Order to Report for Work of National Importance.

(Signed by J. F. Brazill, dated May 4, 1942, to Jarmon Thomas Conway, stating that he had been assigned to Civilian Public Service #31Camp located at Placerville, California. That you will therefore report to the LocalBoard named above at 9:30 a.m. on the 14th day of May, 1942)

Thereafter Witness Riordan testified as follows:

Mr. Walsh: Q. Do you know what was done with the original of Government's Exhibit 9 in evidence, Mr. Riordan?

A. The original of that order to report was mailed to the defendant, Mr. Conway.

Mr. Walsh: Gentlemen, I will read you Government's Exhibit No. 9 in evidence.

(Testimony of Thomas B. Riordan.)

(Government's Exhibit 9 in evidence was read to the jury)

Mr. Walsh: Q. After the original of Government's Exhibit No. 9 had been mailed to the defendant Conway, did you see him.

A. Yes, sir.

Q. And when?

A. It was on the 14th day of May, 1941. [37]

Q. And where? A. I saw him at our office.

Q. And did you have any *have any* conversation with him at that time? A. I did.

Q. Who else was present besides the defendant and yourself?

A. Mrs. Stoddard, my clerk, was present, and I don't recall if anyone else was in the office or not.

Q. What was that conversation?

A. Mr. Conway said to me that he was not going to go to this camp. He said, "I refuse to go."

Q. And what else was said at that time?

A. I stated to him—I said "Then, do you want to go to the Army?" And he says "No, I won't go to the Army," and I said, "Well, what do you want to do?" He said, "I don't want to do anything." I told him "all right you just remain seated there." I had several other men that were going to camp. I think there were about five or six altogether, so I told Mr. Conway to remain seated, and I went across the street to the bus station and arranged for transportation for these other men on the Santa Fe Bus that was leaving that morning for Placer, and

(Testimony of Thomas B. Riordan.)

I came back to the office, and Mr. Conway was still sitting there, and about that time the bus, the Santa Fe Bus, pulled up and these other men were all ready, ready to go, so I said, "Well, fellows," I said, "The bus is here." I said, "Let's go," and I turned to Mr. Conway and I said, "Now, Mr. Conway, this is your last chance." I said, "Do you still refuse to go to this civilian camp?" And he said, "Yes, I do," he said, "I am not going", I said, "all right, you just remain seated till I get back," so I took the other men there and gave the leader of the group the transportation, and I gave him the meal tickets providing meals for them while they were en route to camp, put them on the bus and when the bus pulled out, I went back to the office, and Mr. Conway was still there, so I asked Mr. Conway if he would come with me, and I—so he did, he came out and we got in my car, and I came in to the Phoenix here and came to the United States Attorney and reported the fact that he refused to go, to the United States Attorney, Mr. Flynn.

Q. What did you do with the defendant thereafter?

A. Then I took the defendant back to Glendale and told him that he could go wherever he wished to go, that we would turn him loose, but to keep us advised as to his address. We wanted to know where he was at all times, that any time he changed his mailing address he was to advise us. I told him he was a free man, he could do as he pleased. That is all.

(Testimony of Thomas B. Riordan.)

Q. Mr. Riordan, do you, as Clerk of Local Board No. 6, have the custody of what is known as the classification record? [38] A. I do.

Q. And can you tell us generally what that record is?

A. That record is a record of each registrant in our Board placed there in numerical order according to the man's order number. Each man's name, age and race appears in that record, as I say in numerical order, starting with Order No. 1 on through down to the larger order number.

Q. And can you locate for us in the classification record the record of this particular defendant?

A. Yes, sir.

Q. And what page is it on?

A. It appears on page 62 of the classification record.

Q. And on what line?

A. It appears on the 15th line down from the top.

Q. Following the number 1938?

A. Following order No. 1938.

Q. Who made the entries, all of the entries following that No. 1938? A. I did.

Q. And are they correct and accurate entries of the transactions which they purport to record?

A. Yes, sir.

Q. Were they made at the time that the actions were taken? A. Yes, sir.

Q. Have you made a true and correct copy of that record as pertains to this defendant's case?

(Testimony of Thomas B. Riordan.)

A. Yes; I have.

Q. And is this such a record (showing document to witness)? A. Yes, it is.

Mr. Walsh: We offer it in evidence.

Mr. Chester: May I ask Mr. Riordan a question before it is admitted?

Q. Mr. Riordan, have you any erasures that appear on the original record there?

A. No, there is no erasure appearing, Mr. Chester.

[39]

Mr. Chester: No objection.

(The document was received as Government's Exhibit No. 10 in evidence)

And is as follows:

GOVERNMENT'S EXHIBIT No. 10
IN EVIDENCE

1. Order No. 1938.
2. Name of Registrant. Jarmon Thomas Conway.
3. Serial No. 1817.
4. Age 21.
5. Race White.
9. Date questionnaire mailed 5-20-41.
11. Date questionnaire returned 6-4-41.
13. Classification IV E.
14. Date notice to appear for physical examination mailed 10-16-41.
15. Date registrant appeared for Physical examination 10-25-41.

(Testimony of Thomas B. Riordan.)

20. Date of appeal to Board of appeal 11-7-41.

21. Date of Forwarding registrants record to appeal Board 11-27-31.

22. Date Notice of Board of appeals decision mailed by local Board 2-3-42.

23. Date Notice of continuance of classification mailed 2-342.

24. Date of order to report to Induction station 5-14-42 9:30.

27. Remarks: Refused to go to camp 5-14-42.

29. Order No. 1938."

Thereafter Witness Riordan testified as follows:

Mr. Walsh: Q. From Government's Exhibit 10, in evidence Mr. Riordan, can you explain to us what the various entries therein mean?

A. In the first column the order number, the man's order number appears, which is 1938. That is followed by the name of the registrant, Jarmon Thomas Conway, followed by serial number 1817; age 21; race, white; date questionnaire was mailed was 5-29-41; date questionnaire returned was 6-4-41; his classification, which is 4-E; date notice to appear for physical examination mailed was 10-16-41; the date the registrant appeared for physical examination was 10-25-41; date classification of Local Board mailed to registrant was 10-29-41; date of appeal to Board of Appeal was 11-7-41; date notice of Board of Appeal's decision mailed by Local [40] Board was 2-3-42; date notice of continuance of classification mailed 2-3-42; date order to report for

(Testimony of Thomas B. Riordan.)

induction was May 4-42; time fixed for registrant to report for transportation to induction station was 5-14-42 at nine-thirty, A.M.; and under "remarks" is "Refused to go to camp on May 14th, 1942" That is followed again by his Order number 1938.

Mr. Walsh: That is all.

Thereupon the witness, Riordan, testified further on

Redirect Examination:

Mr. Walsh: Q. Mr. Riordan, I show you a part of Government's exhibit No. 5 in evidence, about counsel's question and ask you whose signature appears on the bottom of it.

A. Jarmon T. Conway, Route 11, Box 1170, Phoenix, Arizona.

Q. And the name of J. F. Rutherford is engraved *or* or printed on there, is it not?

A. Yes, it says, "Watch tower Bible & Tract Society, J. F. Rutherford, President." That is printed on there.

Mr. Walsh: That is all.

Thereupon the witness,

JAMES STOKELY

was called and sworn on behalf of the Government and testified as follows:

Mr. Walsh:

A. I am acting as Clerk of the Board of Appeals, Selective Service.

(Testimony of James Stokely.)

Q. I hand you Government's Exhibit No. 11 for identification, and ask you if that is your signature? A. That is my signature.

Q. And I will ask you if that letter accompanied the file when it was returned to the Local Board at Glendale? A. Yes, it did.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Your Honor, I object to this being offered in evidence due to the fact that it is immaterial and has nothing whatsoever to do, so far as I can see, with the man's classification as a minister.

The Court: Well, he was not classified as a minister. It may be received.

Mr. Chester: Exception.

(The document was received as Government's Exhibit 11 in Evidence) [41]

Being as follows:

GOVERNMENT'S EXHIBIT No. 11
IN EVIDENCE

(Being a letter from James Stokeley, Clerk Board of appeals, Selective Service System to Chairman Maricopan County Local Board No. 6, Glendale, Arizona, returning the records in connection with the appeal of Jarmon Thomas Conway, and affirming the classification of registrant in Class IV-E.)

(Testimony of James Stokely.)

Thereafter Witness Stokeley testified as follows:

Mr. Walsh: Q. That letter was written, Mr. Stokeley, in the capacity as Clerk of the Board?

A. Yes, sir.

Q. And upon the authority of the Board?

A. Yes, sir.

Q. And upon the authority of the Board?

A. Yes, sir.

Mr. Walsh: That is all.

Thereupon the witness,

BLAINE B. SHIMMEL

was sworn and testified on behalf of the Government, and testified as follows:

Mr. Walsh:

A. I am chairman of that Board.

Q. Were you such in the month of November, 1941? A. I was.

Q. And you have been continuously to this date?

A. I have.

Q. I hand you Government's Exhibit No. 2 in evidence and ask you if that is your signature that appears thereon? A. Yes, sir.

Q. And if this is your signature here, (indicating document)?

A. Both signatures designated as Chairman of the Board of Appeals are my signatures.

Q. Were you present at the meeting of the

(Testimony of Blaine B. Shimmel.)
Board of Appeals when the case of the defendant Jarmon Thomas Conway was considered?

A. I was. [42]

Q. And the minutes of the actions taken by the Board as shown here; that is, classifying the registrant in Class 4-E by a vote of five to nothing, that was the action taken at that meeting?

A. That was.

That thereupon the defendant was sworn and testified as a witness in his own behalf as follows:

Testimony of

JARMON THOMAS CONWAY

Mr. Chester:

Q. Will you state your name for the Court, Mr. Conway? A. Jarmon Thomas Conway.

Q. This questionnaire which is in evidence before the Court is the one that you signed?

A. Yes.

Q. And you were later ordered to report for transportation and service in the—under the civilian direction, is that correct?

A. Yes, I was.

Q. Now, did you at any time after you were classified in 4-E appear before the Board, the Glendale Board? A. Yes, I did.

Q. Well, did you have any conversation with them?

A. I was asking to put in an appeal. I was per-

(Testimony of Jarmon Thomas Conway.)

mitted to sign on the back of my questionnaire for an appeal.

Q. And were you ever present when they confirmed that appeal?

Mr. Walsh: I object to that as entirely immaterial, your Honor. No requirement that he be present; no showing that he ever requested permission.

The Court: Sustained.

Mr. Chester: Well, that goes to the matter of intent, your Honor. It is a question of fact whether he did or not.

The Court: The objection is sustained.

Mr. Chester: Exception.

Q. And you put in your appeal? A. Yes.

[43]

Q. And was that acted upon, to your knowledge?

A. It was acted on. I got a card some time later from the—that it had been overruled and I still had the same classification.

Q. Did you attempt any further appeal?

A. Well, not at the same time, and then I went to the State Director of Headquarters and tried to put in an appeal there.

Q. State Director? Was it at the State Director of the Selective Service?

A. Well, yes, I suppose so.

Q. And did you request further appeal from the Appeal Board.

A. No, not——

Q. (Interrupting) Did you request a further appeal? A. Yes.

(Testimony of Jarmon Thomas Conway.)

Mr. Walsh: I object to that, your Honor. It is immaterial. He testified he did appeal and it was acted upon.

The Court: He can appeal to the President, can't he.

Mr. Walsh: Not on this type of case.

The Court: Well, I don't know.

Mr. Chester: Well, it is material to show that the man appealed as far as he could go, that he pursued all the remedies that were available to him.

The Court: Well, the question I want answered is whether he did enter an appeal from this order of the State Appeal Board. If he didn't, we are wasting time.

Mr. Chester: The Selective Service Rules provide that you should go to the State Director for further appeal, and the rules and laws covering the Selective Service System——

Mr. Walsh: (interrupting) Do you have those regulations?

Mr. Chester: We might call Mr. Shimmel, an expert witness.

(a document was handed to the Court by Mr. Walsh)

The Court: Is this the latest regulation?

Mr. Walsh: I am advised that it is, your Honor. [44]

Mr. Chester: I believe the section is 628.1, your Honor.

(The document was read by the Court)

(Testimony of Jarmon Thomas Conway.)

The Court: Well, the appeal can only be taken in the event one or more members of the Board dissent from the classification.

Mr. Walsh: The record here is that it was unanimous.

Mr. Chester: That is the Court's ruling?

The Court: The objection is sustained.

Mr. Chester: Exception.

Mr. Chester: Q. Are you a minister, Mr. Conway?

Mr. Walsh: I object to that, your Honor, it is immaterial, incompetent and irrelevant.

The Court: The objection is sustained.

Mr. Chester: What was the ruling, your Honor?

The Court: Sustained.

Mr. Chester: Q. How long have you been a member of Jehovah's Witnesses, Mr. Conway?

A. Ever since 1939.

Q. Since December, 1939? A. Yes.

Mr. Chester: I'd like to have these marked in evidence as one exhibit.

(Thereupon the documents were marked as Defendant's Exhibit A for identification)

Which documents consisted of the following:

DEFENDANT'S EXHIBIT A FOR IDENTIFICATION

(Being 50 affidavits, signed by residents of Arizona, all duly subscribed and sworn to, to the effect that Jarmon Conway was a member of Jehovah's Witnesses and is regarded by af-

(Testimony of Jarmon Thomas Conway.)

fiants and others of the same faith as a duly ordained minister in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded)

Thereupon the following proceedings were had:

Mr. Chester: Q. I hand you these affidavits, Mr. Conway, and ask you if you know what they are?

Mr. Walsh: I object to that, the affidavits speak for themselves, your Honor.

The Court: He may answer. [45]

Mr. Chester: Q. Do you know what they are?

A. Yes, affidavits signed by——

The Court: (Interrupting) That is all right, they are affidavits.

Mr. Chester: And did you have these executed by the persons that signed them, yourself?

A. Yes.

Mr. Walsh: Are you offering them?

Mr. Chester: I am offering them.

Mr. Walsh: We object to them, your Honor, on the ground that they are irrelevant and immaterial and have no bearing on any issues in this case.

The Court: The objection is sustained.

Mr. Chester: Exception.

Thereafter the following proceedings were had:

Mr. Chester: Your Honor, at this time I would like to ask for a ruling of the Court. We have some fifteen or twenty witnesses that would testify——

Mr. Walsh: (interrupting) Just one moment.

(Testimony of Jarmon Thomas Conway.)
Perhaps this should be offered in the absence of the jury.

The Court: Oh, all they will testify to is that he is a minister, and you will object to it and I will sustain the objection. What is the use of sending the jury out? All right, is that all?

Mr. Chester: That is all.

The Court: You may proceed with the arguments.

(Thereupon the opening argument was presented to the jury by counsel for plaintiff).

Mr. Chester: At this time I should like to move for a directed verdict, for the reason—in favor of the defendant, for the reason that the Board as has been admitted by this Board here, found him fit for general service, which automatically puts him into the class that should be inducted in non-combatant service in the armed forces. Instead of following the rules and regulations of the Selective Service Board as is set forth, they ordered him to a conscientious objector's camp.

The Court: The motion is denied. Go ahead with your argument. [46]

That thereafter on said 9th day of April, 1943, before the Court had instructed the jury, defendant made and filed the following requested instructions to the jury.

("Title of Court and Cause)

DEFENDANT'S REQUESTED INSTRUCTIONS.

1. The Selective Service Board cannot bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

2. An individual cannot be deprived of his rights of freedom of person even in war time, except through machinery which guarantees the fundamentals of "Due Process of Law" and a classification by a Selective Service Board not supported by any evidence is arbitrary and constitutes an abuse of discretion depriving defendant of due process of law and his right to freedom of religion guaranteed under the Constitution of the United States.

3. As to conscientious objectors, it is apparent that they may be required to serve in noncombatant work either by induction into the land or naval forces or by assignment to work under civilian direction. If a conscientious objector is found by the Board to be that of one whose claim that he is a conscientious objector has been sustained by the Board for "induction" into the land or naval forces for noncombatant service, he cannot be required by the Board to be assigned to serve under civilian di-

rection, and violates no duty required of him under the Act if he fails to report for such service.

4. The provision that one who shall "knowingly" fail or neglect to perform duty required by Selective Service Act shall be subject to certain penalties implies wilful knowledge and a specific intent and defendants in selective service cases are permitted to give their reasons for failure to obey, as going to intent.

W. H. CHESTER,
Attorney for Defendant,
412 Phx. Natl. Bank Bldg.
Phoenix, Arizona."

(Which instructions were not given). [47]

Thereafter, after argument, the Court instructed the jury in part as follows:

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey the Local Draft Board's order to report for induction and then offer as a defense for his failure to comply with the Board's order, some arbitrary or capricious Act of the Board in determining his classification and issuing the order.

Any Exceptions? I have refused your requested instructions.

Mr. Chester: I take exceptions to the Court's re-

fusal to give the defendant's requested instructions, and I also take exception to the instruction wherein the Court makes the statement on the decision of the Selective Service Board as being final except where an appeal is taken, and to the instruction that the defendant cannot offer as defense that the order of the Board is arbitrary and capricious, as that violates the due process of law and the provisions of the Constitution.

The defendant presents the foregoing as his proposed Bill of Exceptions in the above entitled matter, and prays that the same may be settled and allowed.

Dated this 9 day of June, 1943.

W. H. CHESTER
Attorney for Defendant.
412 Phx. Natl. Bank Bldg.
Phoenix, Arizona. [48]

The foregoing Bill of Exceptions is correct and may be settled and allowed by the Court.

Dated: June 9, 1943.

FRANK E. FLYNN
United States Attorney.

The foregoing Bill of Exceptions is correct and is hereby settled, allowed and approved.

Dated: June 9, 1943.

DAVE W. LING
Judge United States District Court.

[Endorsed]: Filed June 9, 1943. [49]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Comes now the defendant above named, by his attorney, W. H. Chester, and says that subsequent to the institution of the above entitled cause and during the trial thereof on the 9th day of April, 1943, the Court committed manifest error in the admission of evidence and in the rulings upon motions of the defendant, and for his assignments of error specifies the following:

I.

That on the 17th day of Feby., 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the selective service system or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the defendant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System. That the defendant herein had been heretofore tried before the District Court of the United States for the District of Arizona for the same offense charged in the indictment and that indictment under this cause constitutes double jeopardy. That the Honorable Court erred in denying said motion to quash, which

order was entered on the 17th day of February, 1943. [50]

II.

The Court erred in overruling defendant's objection to Exhibit number 7 in evidence to which defendant excepted, said Government Exhibit Number 7 being a letter from A. M. Tuthill, State Director Selective Service of the State of Arizona to J. S. Brizill, Chairman Maricopa County Local Board No. 6, Glendale, Arizona, as follows:

> Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System.

This letter, it is contended by the defendant is immaterial, and prejudicial to the defendant in that under Selective Service Opinion Number 14 (see Government's Exhibit Number 6) it is provided that in regards to members of Jehovah's Witnesses, "It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the Local Board, based on whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of

other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded? As may be seen from above opinion, each case must stand upon its own merits and a statement as to whether or not the defendant's name appeared on the roll of "Bethel Family" or "Pioneers" would not have a conclusive bearing on the question as to whether or not the defendant was a "minister". [51]

III.

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No. 11 in evidence, which purports to be a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System to the Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the defendant herein and affirming classification of registrant in Class IV-E for the reason that said letter was immaterial due to the fact that the defendant was denied a proper hearing as to his qualifications and as a minister and any purported decision based on a file of defendant's case where no hearing had ever been granted to him regarding his classification either before the Local Board or the Board of Appeals would be and is incompetent, and immaterial.

IV.

That the Honorable Court erred in sustaining the Government's objections to the introduction in evi-

dence of Defendant's Exhibit A being some 47 affidavits of Jehovah's Witnesses affirming the fact that the affiants regarded the defendant as a minister for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6 to appear for work under civilian direction was an unlawful order in that it violated the rules of the Selective Service System by wrong classification of a registrant and by the issuance of orders pursuant to such unlawful classification. Admission of said affidavits in evidence would tend to disprove intent to violate any lawful order of the Maricopa County Local Board No. 6 issued to the defendant. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. [52]

V.

The Honorable Court erred in denying the motion of the defendant for a directed verdict, said directed verdict having been requested by the defendant for the reason that the Maricopa County Local Board No. 6 of Glendale, Arizona had found the defendant fit for general service, which automatically put him into the class that should, under Selective Service Regulations, place him as an inductee in non-combatant service in the armed forces. The said Local Board, instead of following rules and regulations of the Selective Service Board, ordered the defendant to a conscientious objectors' camp. It has been held heretofore by the United States Circuit Court of Appeals for the Ninth Cir-

cuit that a conscientious objector, found fit for "general service" is required to obey only an order for induction for service into the land or naval forces and that a Local Board has no power to "assign" such registrant to work of national importance under civilian direction and order him to report to such authorities. The Circuit Court held that, "It is no violation of Section 11 of the Act to fail to obey an order which the Board had no power to make."

VI.

That the Honorable Court erred in refusing to give to the jury the defendant's requested instructions and further erred in the court's instruction to the jury to the effect that the defendant cannot offer as a defense that the order of the Board is arbitrary and capricious, this latter instruction patently violates the constitutional provisions guaranteeing due process of law and the right of freedom of the person and freedom of religion. Defendant duly excepted to the Court's failure to grant his requested instructions and to the Court's granting or giving instruction depriving defendant of defense where the Board acted in an arbitrary and capricious manner. [53]

The above assignments of error are hereby respectfully submitted this 9th day of June, 1943.

W. H. CHESTER
Attorney for Defendant
412 Phoenix National
Bank Building
Phoenix, Arizona

Service of copy acknowledged this 9th day of June, 1943.

F. E. FLYNN (s)
United States Attorney

[Endorsed]: Filed Jun 9 1943. [54]

In the United States District Court for the District of Arizona

April 1943 Term — At Phoenix

MINUTE ENTRY OF WEDNESDAY, JUNE 23, 1943

(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

C-6420

[Title of Cause.]

On motion of Wm. H. Chester, Esquire, counsel for the defendant,

It Is Ordered that the following exhibits admitted in evidence or marked for identification at the trial of this case and the duplicate of the Reporter's transcript herein, together with the duplicate of the Reporter's transcript filed in Case No. C-6333-Phoenix, United States of America vs. Jarmon Thomas Conway, be transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, with the transcript of Record on Appeal herein:

Government's exhibits Numbers 1 to 11 inclusive, in evidence.

Defendant's exhibit A, marked for identification.

[55]

In the United States District Court for the District of Arizona

United States of America
District of Arizona—ss:

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said court, including the records, papers and files in the case of United States of America, plaintiff, versus Jarmon Thomas Conway, defendant, numbered C-6420 Phoenix, on the docket of said court.

I further certify that the attached pages, numbered 1 to 55, inclusive, contain a full, true and correct transcript of such matters of record as are pertinent to the appeal in said cause, as the same appear from the originals thereof remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the duplicate of the reporter's transcript filed in said cause together with the duplicate of the reporter's transcript filed in cause numbered C-6333 Phoenix, United States of America, plaintiff, versus Jarmon Thomas Conway, defend-

ant; and the originals of Government's exhibits numbered 1 to 11 inclusive, in evidence, and of Defendant's exhibit marked A for identification, are transmitted herewith pursuant to order of the Court.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of $11.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 29th day of June, 1943.

[Seal] EDWARD W. SCRUGGS, Clerk
By WM. H. LOVELESS
Chief Deputy Clerk. [56]

[Endorsed]: No. 10414. United States Circuit Court of Appeals for the Ninth Circuit. Jarmon Thomas Conway, Appellant. vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed July 1, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10414

UNITED STATES OF AMERICA,

vs.

JARMON CONWAY,

Defendant.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The Appellant relies upon the assignments of error appearing in the transcript of the record as the Statement of Points on which Appellant intends to rely on Appeal and hereby refers to said Assignments of Error as appearing in said transcript and adopts the same as his Statement of Points on which Appellant intends to rely on appeal and incorporates the same herein, at this point, by reference as though set out herein in full.

W. H. CHESTER
Attorney for Appellant
412 Phoenix Nat'l Bank
Bldg., Phoenix, Arizona

Copy received July 12th, 1943.
F. E. FLYNN
U. S. Attorney
By E. R. THURMAN
Asst. U. S. Attorney

[Endorsed]: Filed Jul 13 1943. Paul P. O'Brien, Clerk.

No. 10414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

W. H. CHESTER,
Attorney for Appellant
412 Phx. Nat'l Bank Bldg.
Phoenix, Arizona.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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No. 10414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JARMON THOMAS CONWAY
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT

JURISDICTION

Jurisdiction is invoked under Section 311, Title 50, United States Code Annotated, said statute being set forth in the 1942 Cumulative Pocket Part to Title 50 of the United States Code Annotated, page 130 of said pocket part which provides in substance that any person who shall knowingly fail or neglect to perform any duty required of him under the provisions of the Selective Service and Training Act of 1940, or the rules and regulations and directions thereunder shall upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000 or by both such fine and imprisonment.

INDICTMENT

Violation 50 U. S. C. 311 (Selective Training and Service Act.)

United States of America,
District of Arizona—ss.

In the District Court of the United States in and for the District of Arizona, at the November Term Thereof, A. D. 1942.

The Grand Jurors of the United States, impaneled, sworn and charged at the term aforesaid, of the Court aforesaid, on their oath present that on the 14th day of May, 1942, at Glendale, Arizona, and within the jurisdiction of this Court, Jarmon Thomas Conway, whose full and true name other than as given herein is to the Grand Jurors unknown, being then and there a person liable for training and service under the Selective Training and Service Act of 1940, and the amendments thereto, and having theretofore registered under said Act, knowingly, wilfully, unlawfully, and feloniously did fail and neglect to perform a duty required of him under and in the execution of said Act and the Rules and Regulations duly made pursuant thereto, in this, that the said Jarmon Thomas Conway, having been classified in Class IV-E by his local board, being Maricopa County Local Board No. 6, created and located in Maricopa County, Arizona, under and by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and the Rules and Regulations issued thereunder, and said defendant having been duly assigned by said board to work of national importance under civilian direction, and having been duly ordered and notified by said board to report for work of national importance under civilian

direction, a copy of which said order and notice is in words and figures as follows, to-wit:

"Local Board No. 6 81
Maricopa County 013
006

May 4, 1942
(Date of mailing)

May 4, 1942
213 E. Glendale Ave.
Glendale, Arizona
(Stamp of local board)

Order To Report For Work Of National Importance

The President of the United States,

To Jarmon (first name), Thomas (middle name), Conway (last name)
Home address Route 11, Box 1170, Phoenix, Arizona.
Order No. 1938

Greeting:

Having submitted yourself to a local board composed of your neighbors and having been classified under the provision of the Selective Training and Service Act of 1940, as amended, as a conscientious objector to both combatant and noncombatant military service (Class IV-E), you have been assigned to work of national importance under civilian direction. You have been assigned to the Civilian Public Service No. 31 Camp, located at Placerville, California, in the State of California.

The Selective Service System will furnish you transportation to the camp, provided you first go to your

local board named above and obtain the proper instructions and papers.

You will, therefore, report to the local board named above at 9:30 A. M. (time) on the 14th day of May, 1942. Local Board Address: 213 E. Glendale, Glendale, Arizona.

You will be examined at the camp for communicable diseases, and you will then be instructed as to your duties.

Wilful failure to report promptly to this local board at the hour and on the day named in this notice is a violation of the Selective Training and Service Act of 1940, as amended, and may subject you to a fine and imprisonment.

You must keep this form and take it with you when you report to your local board.

(Signed) J. S. BRAZILL
Member of Local Board

The action of said local board, as aforesaid, being pursuant to the power conferred upon said board by the Selective Training and Service Act of 1940, and the amendments thereto, and the Rules and Regulations duly made pursuant thereto, knowingly, wilfully, unlawfully and feloniously did fail and neglect to report to his said local board at 9:30 A. M. on the 14th day of May, 1942, or at any other time, for work of national importance under civilian direction, as he was required to do by said order.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

F. E. FLYNN
United States Attorney.

Indictment A true bill, Sam W. Seany Foreman. (Endorsed): Filed Jan. 28, 1943

PLEA OF NOT GUILTY

The appellant, Jarmon Thomas Conway, entered a plea of not guilty upon his arraignment.

TRIAL

The cause herein came on regularly for trial in the District Court of Arizona before the Honorable Dave W. Ling presiding with a jury on the 9th day of April, 1943, at Phoenix, Arizona.

STATEMENT

The appellant, Jarmon Thomas Conway, is a member of Jehovah's witnesses, a Christian Society engaged in the teaching and preaching of the Bible and is opposed to war. The said appellant, Jarmon Thomas Conway, registered under the Selective Service Act of 1940, being Title 50, U. S. C. A.-Ch. 301-311, on June 3, 1941. He was thereafter classified as IV-E by the Local Selective Service Board at Glendale, Arizona on October 28, 1941 from which classification appellant appealed to the Board of Appeals which on January 23, 1942 classified the appellant in Class IV, subdivision E. (T.R.22). The Transcript of Record (T.R. page 22) that under the heading "Minutes of Other Action" that on November 25, 1941 the Board of Appeals found that Appellant should not be classed in IV (other than IV-E Class III, Class II or Class I-H. The appellant was thereafter ordered to report for work of national importance under civilian direction.

Thereafter, and pursuant to Selective Service Rules and Regulations (Sec. 628.1) requested the State

Director to enter a further appeal (T.R.57), which was denied. The questionnaire of appellant (Government's Exhibit No. 2 in Evidence (T.R.21) show that appellant stated in said questionnaire as follows: "I am a minister of religion." "I do customarily serve as a minister." "I have been a minister of Jehovah's witnesses since October, 1938." Such statements clearly showing that the appellant claimed ministerial status.

Government's Exhibit No. 4 in evidence discloses that appellant was opposed to armed conflict and that he had preached the Gospel of the Kingdom of Jehovah God from door to door since October, 1938. (T.R.29) That he had given public expression since engaging in this work and had gone from door to door in Phoenix and vicinity preaching the word of Jehovah and distributing written Bible prophesy. (T.R.30) That he was a member of Jehovah's witnesses. (T.R.31).

Government's Exhibit No. 5 in evidence (T.R.34) discloses that appellant claimed that he should be properly classified in class IV-D (Regular Minister).

Government's Exhibit No. 6 (T.R.29-40) shows that appellant made further claim to classification IV-D and said exhibit sets forth sections of the Selective Service Act and Rules and Regulations of said Act providing for such classification. Government's Exhibit No. 6 further discloses that under "Opinion No. 14 of National Headquarters Selective Service System" the ministerial status of Jehovah's witnesses should be considered by Selective Service Boards in accordance with whatever status the other members of the society regarded the registrant. See Govern-

ment Exhibit No. 6, Vol. III-Opinion No. 14-National Headquarters, Selective Service System.

Government's Exhibit No. 3 (T.R.-25) shows conclusively that the Glendale, Arizona Local Selective Service Board found appellant, Jarmon Thomas Conway, "Qualified for general military service IV-E" on October 25, 1941.

Subsequently and on May 21, 1942 the appellant was ordered to report to Induction Station on May 14, 1942. The appellant reported as per orders and refused to go to a conscientious objector's camp on May 14, 1942.

The appellant herein was subsequently indicted and tried for failure to obey orders of the Local Selective Service Board at Glendale, Arizona and was tried and found guilty in his first trial on November 17, 1942. This case was appealed to the Circuit Court of Appeals for the Ninth District which case was docketed in said court on December 23, 1942 under No. 10332, and a reporter's transcript of said trial was filed in said case, said reporter's transcript being referred to later in this brief.

The United States Circuit Court of Appeals on January 15, 1943 on motion of the District Attorney for the District of Arizona reversed the judgment of the District Court in cause 10332—Jarmon Thomas Conway vs. United States of America on authority of Robert Earl Hopper, appellant, vs. United States of America, appellee, No. 10,110, decided December 18, 1942 in U. S. Circuit Court of Appeals for the Ninth District.

The appellant, Jarmon Thomas Conway, was reindicted and tried on the same charge in the instant case, found guilty, and this appeal follows conviction upon the charge as laid in the indictment.

SPECIFICATIONS OF ERROR

Appellant, Jarmon Thomas Conway, relies upon the Assignments of Error set forth under the appropriate specification to which they relate, which asignments are set forth in full under their separate specification. The separate specifications and questions involved are covered by the Asignments of Error as follows:

Specification Of Error No. I

The indictment is fatally defective because: (a) It does not state facts to constitute a crime or offense.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197

(b) That the indictment failed to state that the action of the Glendale, Arizona Local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the appellant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

(c) That the appellant had been tried before the District Court for this same offense and that indictment

under this cause constitutes double jeopardy. This portion of the specification of error as it pertains to the indictment and claiming double jeopardy is waived.

Specification of Error No. II

The Court ererd in overruling defendant's objection to Exhibit No. 7 in evidence to which defendant excepted, said Government Exhibit Number 7 being a letter from A. M. Tuthill, State Director of Selective Service of the State of Arizona to J. S. Brazill, Chairman Maricopa County Local Board No. 6, Glendale, Arizona, as follows:

> Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System.

This letter, it is contended by the defendant is immaterial, and prejudicial to the defendant in that under Selective Service Opinion No. 14 (see Government's Exhibit Number 6) it is provided that in regards to members of Jehovah's Witnesses, "It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the Local Board, based on whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other

Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded. As may be seen from the above opinion, each case must stand upon its own merits and a statement as to whether or not the defendant's name appeared on the roll of "Bethel Family" or "Pioneers" would not have a conclusive bearing on the question as to whether or not the defendant was a "minister." (T.R.66-67).

Consequently admission of the Tuthill letter was prejudicial error and the statement therein contained when considered in light of "Opinion Number 14 of National Headquarters, Selective Service System" is immaterial.

The rules and regulations of the Selective Service System have been given the status of a law insofar as the courts are concerned and the National Headquarter's Opinion as to the ministerial status of Jehovah's Witnesses constitutes the rule of the Selective Service Boards. Hence a finding that appellant was not a minister because he was not on the "Pioneer" or "Bethel Family" list is clearly inadequate and an order based on such finding is invalid as the Local Selective Service Board failed to conform the law as set forth by rules and regulations binding them.

> See Dissenting Opinion Justice Jackson in Bowles vs. U. S., 87 Law Edition, Page 919;
>
> U. S. vs. Johnson, 126 Fed (2nd) 242.
>
> Justice Jackson stated as follows: "I did not readily assume that, whatever may be the consequences of refusing to report for induction, court must convict and punish one for disobedience of an unlawful order by whomsoever made." See Page 922.

Specification of Error No. III

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Government's Exhibit No 11 in evidence, which purports to be a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System to the Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the defendant herein and affirming classification of registrant in Class IV-E for the reason that said letter was immaterial due to the fact that the defendant was denied a proper hearing as to his qualifications and as a minister and any purported decision based on a file of defendant's case where no hearing had ever been granted to him regarding his classification either before the Local Board or the Board of Appeals would be and is incompetent, and immaterial. (T.R.-67).

In connection with the above specification of error the following testimony was introduced on behalf of the Government during the trial of the cause. (See T.R. 53-54.)

(Testimony of James Stokeley).

Q. I hand you Government's Exhibit No. 11 for identification, and ask you if that is your signature.

A. That is my signature.

Q. And I will ask you if that letter accompanied the file when it was returned to the Local Board at Glendale.? A. Yes, it did.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Your honor, I object to this being

offered in evidence due to the fact that it is immaterial and has nothing whatsoever to do, so far as I can see, with the man's classification as a minister.

The Court: Well, he was not classified as a minister. It may be received.

Mr. Chester: Exception.

(The document was received as Government's Exhibit 11 in Exidence, being a letter from James Stokeley, Clerk Board of appeals, Selective Service System to Chairman Maricopa County Local Board No. 6, Glendale, Arizona, returning the records in connection with the appeal of Jarmon Thomas Conway, and affirming the clasification of registrant in Class IV-E.)

Thereafter Witness Stokeley testified as follows:

Mr. Walsh: Q. That letter was written, Mr. Stokeley, in the capacity as Clerk of the Board?

A. Yes, sir.

Q. And upon the authority of the Board?

A. Yes, sir.

Mr. Walsh: That is all.

This letter has no bearing on whether or not the appellant disobeyed an order of the draft board and in the absence of any proof of a hearing before the board, is self-serving as to the Government and prejudicial to appellant. There was never shown by the government that appellant was given a hearing and allowed to present evidence to support his contention that he was entitled to classification IV-D.

Specification of Error No. IV

That the Honorable Court erred in sustaining the Government's objections to the introduction in evidence of Defendant's Exhibit A being some 47 affidavits of Jehovah's Witnesses affirming the fact that the affiants regarded the defendant as a minister for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6 to appear for work under civilian direction was an unlawful order in that it violated the rules of the Selective Service System by wrong classification of a registrant and by the issuance of orders pursuant to such unlawful classification. Admission of said affidavits in evidence would tend to disprove intent to violate any lawful order of the Maricopa County Local Board No. 6 issued to the defendant. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. (T.R.67-68).

(Testimony of Jarmon Thomas Conway). (T.R.60).

Thereupon the following proceedings were had:

Mr. Chester: Q. I hand you these affidavits, Mr. Conway, and ask you if you know what they are?

Mr. Walsh: I object to that, the affidavits speak for themselves, your Honor.

The Court: He may answer.

Mr. Chester: Q. Do you know what they are?
A. Yes, affidavits signed by—

The Court: (Interrupting) That is all right, they are affidavits.

Mr. Chester: And did you have these executed by the persons that signed them, yourself?

A. Yes.

Mr. Walsh: Are you offering them?

Mr. Chester: I am offering them.

Mr. Walsh: We object to them, your Honor, on the ground that they are irrelevant and immaterial and have no bearing on any issues in this case.

The Court: The objection is sustained.

Mr. Chester: Exception. (T.R.60).

It is further contention of appellant that admission of said affidavits would tend to prove that appellant was never allowed full and fair hearing before the local Selective Service Board No. 6, Glendale, Maricopa County, Arizona, or before the appeal board. No hearing was ever had where appellant was allowed to appear and produce evidence as to his correct classification. This is in violation of Article 5 of the Constitution of the United States and as construed and applied deprives appellant of liberty and property without due process of law.

Specification of Error No. V

The Honorable Court erred in denying the motion of the defendant for a directed verdict, said directed verdict having been requested by the defendant for the reason that the Maricopa County Local Board No. 6 of Glendale, Arizona had found the defendant fit for general service, which automatically put him into the class that should, under Selective Service Regulations, place him as an inductee in non-combatant service in the armed forces. The said Local Board, instead of following rules and regulations of the Selective Service Board, ordered the defendant to a conscientious objectors' camp. It has been held hereto-

fore by the United States Circuit Court of Appeals for the Ninth Circuit that a conscientious objector, found fit for "general service" is required to obey only an order for induction for service into the land or naval forces and that a Local Board has no power to "assign" such registrant to work of national importance under civilian direction and order him to report to such authorities. The Circuit Court held that, "It is no violation of Section 311 of the Act to fail to obey an order which the Board had no power to make."

(Testimony of Jarmon Thomas Conway.) (T.R.61).

Mr. Chester: At this time I should like to move for a directed verdict, for the reason—in favor of the defendant, for the reason that the Board as has been admitted by this Board here, found him fit for general service, which automatically puts him into the class that should be inducted in non-combatant service in the armed forces. Instead of following the rules and regulations of the Selective Service Board as is set forth, they ordered him to a conscientious objectors' camp.

The Court: The motion is denied. Go ahead with your argument. (T.R.61).

Ref.:—Robert Earl Hopper vs. United States of America—United States Circuit Court of Appeals for the Ninth District—No. 10,110, Decided December 18th, 1942.

Specification of Error No. VI

That the Honorable Court erred in refusing to give to the jury the defendant's requested instructions and further erred in the court's instruction to the jury to the effect that the defendant cannot offer as a defense

that the order of the Board is arbitrary and capricious, this latter instruction patently violates the constitutional provisions guaranteeing due process of law and the right of freedom of the person and freedom of religion. Defendant duly excepted to the Court's failure to grant his requested instructions and to the Court's granting or giving instruction depriving defendant of defense where the Board acted in an arbitrary and capricious manner. (T.R.69).

Requested instructions were as follows: (T.R.62-63).

1. The Selective Service Board cannot bind a registrant by an arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

2. An individual cannot be deprived of his rights of freedom of person even in war time, except through machinery which guarantees the fundamentals of "Due Process of Law" and a classification by a Selective Service Board not supported by any evidence is arbitrary and constitutes an abuse of discretion depriving defendant of due process of law and his right to freedom of religion guaranteed under the Constitution of the United States.

3. As to conscientious objectors, it is apparent that they may be required to serve in non-combatant work either by induction into the land or naval forces or by assignment to work under civilian direction. If a conscientious objector is found by the Board to be that of one whose claim that he is a conscientious objector has been sustained by the Board for "induction" into

the land or naval forces for non-combatant service, he cannot be required by the Board to be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fails to report for such service.

4. The provision that one who shall "knowingly" fail or neglect to perform duty required by Selective Service Act shall be subject to certain penalties implies wilful knowledge and a specific intent and defendants in selective service cases are permitted to give their reasons for failure to obey, as going to intent.

W. H. CHESTER,
Attorney for defendant,
412 Phoenix National Bank Bldg.
Phoenix, Arizona.

(Which instructions were not given).

Thereafter, after argument, the Court instructed the jury in part as follows:

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's orders and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey the Local Draft Board's order, some arbitrary or capricious act of the Board in determining his classification and issuing the order.

Any Exceptions? I have refused your requested instructions.

Mr. Chester: I take exceptions to the Court's refusal to give the defendant's requested instructions, and I also take exception to the instructions wherein the Court makes the statement on the decision of the Selective Service Board as being final except where an appeal is taken, and to the instruction that defendant cannot offer as defense that the order of the Board is arbitrary and capricious, as that violates the due process of law and the provisions of the Constitution. (T.R.63-64).

ARGUMENT

Assignment of Error No. I

That on the 17th day of Feby., 1943, the defendant moved to quash the indictment upon the grounds and for the reasons that said information does not state facts sufficient to constitute a crime or offense and that the indictment failed to state that the action of the Glendale, Arizona local selective service board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the defendant was properly classified or that the orders of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System. That the defendant herein had been heretofore tried before the District Court of the United States for the district of Arizona for the same offense charged in the indictment and that indictment under this cause constitutes double jeopardy. That the Honorable Court erred in denying said motion to quash, which order was entered on the 17th day of February, 1943. (T.R.65-66).

The indictment is fatally defective because: (a) The indictment failed to state that the action of the Glendale, Arizona Local Selective Service Board acted in accordance with the rules and regulations of the Selective Service System or that it acted in accordance with the Selective Service Act and the provisions thereunder. That the indictment failed to show that the appellant was properly classified or that the orders

of the board were in accordance with the rules, regulations and laws pertaining to the Selective Service System.

U. S. vs. Cruickshank, 92 U. S. 542;
U. S. vs. Britton, 107 U. S. 655;
Harris vs. U. S., 104 Fed (2nd) 41;
Kane vs. U. S., 120 Fed (2nd) 990;
Pettibone vs. U. S., 148 U. S. 197.

(b) The appellant had been tried before the District Court for this same offense and that indictment under this cause constitutes double jeopardy. This portion of the assignment of error as it pertains to the indictment and claiming double jeopardy is waived.

Assignment of Error No. II

The Court erred in overruling defendant's objection to Exhibit number 7 in evidence to which defendant excepted, said Government Exhibit Number 7 being a letter from A. M. Tuthill, State Director Selective Service of the State of Arizona to J. S. Brazill, Chairman Maricopa County Local Board No. 6, Glendale, Arizona, as follows:

> Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System.

This letter, it is contended by the defendant is immaterial, and prejudicial to the defendant in that under Selective Service Opinion Number 14 (see Government's Exhibit Number 6) it is provided that in regards to members of Jehovah's Witnesses, "It is impossible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the Local Board, based on whether or not they devote their lives in the furtherance of the beliefs of

Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded? As may be seen from above opinion, each case must stand upon its own merits and a statement as to whether or not the defendants name appeared on the roll of "Bethel Family" or "Pioneers" would not have a conclusive bearing on the question as to whether or not the defendant was a "minister". (T.R.66-67).

(Testimony of Thomas B. Riordan.) (T.R.41-43).

And Witness Riordan thereafter testified as follows:

Mr. Walsh: Q. I believe you testified a while ago, Mr. Riordan, that you had checked a list of the ministers of Jehovah's Witnesses in your office at Glendale? A. Yes, sir.

Q. Did you on behalf of the Board, make any further investigation as to whether or not the defendant Conway was on any list of ministers of the sect known as Jehovah's Witnesses?

A. Yes; I did.

Q. What did you do in that regard?

A. Well, I thought maybe that there might be a revised list or there might be a later list that his name would appear on, so I called our State Headquarters to ask them whether or not they had a list down there of—a revised list of Jehovah Witness ministers, and asked them to check their list to ascertain whether or not Jarmon Thomas Conway was on that list, listed as a minister.

Q. Did you receive any report from your State Headquarters in that regard?

A. I did, yes, sir.

Mr. Walsh: May this be marked?

(The document was marked as Government's Exhibit 7 for identification)

Mr. Walsh: Q. I hand you Government's Exhibit 7 for identification and ask you if that is the report which you received?

A. Yes; that is the report that I received from our State Headquarters.

Q. And this is part of the Local Board's file in relation to this defendant? A. Yes; it is.

Mr. Walsh: I offer it in evidence.

Mr. Chester: Well, your Honor, I object to this particular letter here as immaterial. The question qualifying a man, whether he is a minister or not does not depend whether his name is shown on the list. In accordance with your Exhibit No. 6, Opinion No. 14 of the Selective Service Board, there is nothing in that opinion that shows a man has to appear on that list.

Mr. Walsh: It certainly goes, your Honor, to the question as to whether or not the Board gave him a hearing and what the Board attempted to do in order to decide the thing fairly.

The Court: There would have to be some way of determining whether a man is a minister. Everyone selected under the Selective Service Act would say, "I am a minister, I don't have to go to war", and that would end it.

Mr. Chester: There is nothing in here that says a man is not a minister.

Mr. Walsh: Maybe the court should see the letter.

The Court: Well, it depends on somebody else other than the individual to determine whether he is a minister or not. I say, anybody selected under the Act would say, "I am a minister," and that would end it. It wouldn't make any sense. It may be received.

Mr. Chester: Exception:

(The document was received as Government's Exhibit 7 in evidence).

Being as follows:

GOVERNMENT'S EXHIBIT NUMBER 7
IN EVIDENCE

(Being a letter from A. M. Tuthill, State Director Selective Service, to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona; and reads as follows:)

"Answering your telephoned request of November 15, 1941, the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses known as "Bethel Family" and as "Pioneers" as furnished this office by National Headquarters, Selective Service System." (T.R.41-43).

Selective Service Opinion No. 14 provides as follows:

VOL. III OPINION NO. 14 (AMENDED)
NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM

SUBJECT: Ministerial Status of Jehovah's Witnesses

FACTS: Jehovah's Witnesses claim exemption from training and service and classification in Class IV-D as duly ordained

ministers of religion under section 5 (d), Selective Training and Service Act of 1940, as amended, and section 622.44, Selective Service Regulations, Second Edition, which read as follows:

Section 5(d):

"Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 622.44:

"*Class IV-D: Minister of religion or divinity student.* (a) In class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

> "(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

Question.—May Jehovah's Witnesses be placed in Class IV-D as regular or duly ordained ministers of religion exempt from training and service?

Answer.

1. The Watchtower Bible and Tract Society, Inc., is incorporated under the laws of the State of New York for charitable, religious, and scientific purposes. The unincorporated body of persons known as Jehovah's Witnesses hold in common certain religious tenets and beliefs and recognize as their terrestrial governing organization the Watchtower Bible and Tract Society, Inc. By their adherence to the organization of this religious corporation, the unincorporated body of Jehovah's Witnesses are considered to constitute a recognized religious sect.

2. The unusual character of organization of Jehovah's Witnesses renders comparisons with recognized churches and religious organizations difficult. Certain members of Jehovah's Witnesses, by reason of the time which they devote, the dedication of their lives which they have made, the attitude of other Jehovah's Witnesses toward them, and the record kept of them and their work, are in a position where they may be recognized as having a standing in relation to

the organization and the other members of Jehovah's Witnesses similar to that occupied by regular or duly ordained ministers of other religions.

3. Members of the Bethel Family are those members of Jehovah's Witnesses who devote their full time and effort to the manufacture and production of books, pamphlets, and supplies for the religious benefit of Jehovah's Witnesses, the purpose of which is to present the beliefs of Jehovah's Witnesses and to convert others. For their religious services, the members of this group receive their subsistence and lodging and in addition a very modest monthly allowance. This group of individuals consists of the office and factory workers at 117 Adams Street, Brooklyn, New York, and workers in the executive offices at 124 Columbia Heights, Brooklyn, New York, and at the Farms. Pioneers of Jehovah's Witnesses are those members of Jehovah's Witnesses who devote all or substantially all of their time to the work of teaching the tenets of their religion and in converting of others to their belief. A certified official list of members of the Bethel Family and Pioneers is being transmitted to the State Directors of Selective Service by National Headquarters of the Selective Service System simultaneously with the release of this amended Opinion. The members of the Bethel Family and Pioneers whose names appear upon such certified official list come within the purview of section 5 (d) of the Selective Training and Service Act of 1940, as amended, and they may be classified in Class IV-D. The status of members of the Bethel Family and pioneers whose names do not appear upon such certified official list shall be determined under the provisions of paragraph 5 of this Opinion.

4. The original paragraph 4 has been consolidated with paragraph 3 of this amended Opinion.

5. The members of Jehovah's Witnesses, known by the various names of members of the Bethel Family, pioneers, regional servants, zone servants, company servants, sound servants, advertising servants, and back-call servants, devote their time and efforts in varying degrees to the dissemination of the tenets and beliefs of Jehovah's Witnesses. The deference paid to these individuals by other members of Jehovah's Witnesses also varies in a great degree. It is possible to make a general determination with respect to these persons as to their relationship to Jehovah's Witnesses. Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions must be determined in each individual case by the local board, based upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and, finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded.

6. In the case of Jehovah's Witnesses, as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision.

LEWIS B. HERSHEY
Director.

This opinion is set forth as a rule by National Headquarters, Selective Service System, to guide local

Selective Service Boards as regards Jehovah's Witnesses. Clearly the local board in this case did not follow the rule (law) of the Selective Service System and its orders therefore that appellant appear for work of national importance is invalid. It is the contention of the appellant that an invalid order need not be obeyed by whomsoever made.

Bowles vs. United States; (87 S. C. Law Ed. 919)
U. S. vs. Johnson, 126 Fed. (2nd) 242, (headnote 5.)

Assignment of Error No. III

That the Honorable Court erred in overruling defendant's objection to the receipt in evidence of Governments Exhibit No. 11 in evidence, which purports to be a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System to the chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the defendant herein and affirming classification of registrant in Class IV-E for the reason that said letter was immaterial due to the fact that the defendant was denied a proper hearing as to his qualifications and as a minister and any purported decision based on a file of defendant's case where no hearing had ever been granted to him regarding his classification either before the Local Board or the Board of Appeals would be and is incompetent, and immaterial. (T.R.67).

The appellant was never allowed a hearing on his conteniion that he should be properly classified as a minister. It was approved by the Government that the Local Selective Board No. 6 of Glendale, Arizona considered only the written documents in its file and that Conway never was allowed a hearing before the Board or any appeal board, (see R.T.38), wherein the following questions and answers are set forth:

Mr. CHESTER: Well, I will ask you, did you have

a hearing, Mr. Riordan, to determine whether or not Mr. Conway was a minister?

A. Yes.

Q. And what was the time of that hearing?

A. His questionnaire and his statements in his questionnaire concerning his occupation; questions concerning what he did regarding his being a minister, and the affidavit and all that he had filed, and also the list that we had of the ministers, and also the letter that we had from our headquarters asking them as to whether or not he appeared on any list that they had. (R.T.37-38).

Also see Reporter's Transcript under cause No. 10332, United States Circuit Court of Appeals for Ninth District, page 24, lines 6 to 9 inclusive:

Q. Now, was any testimony taken from the members of the Jehovah's Witness society as to whether or not they considered him a minister?

A. Not to my knowledge.

Also see R.T. cause No. 10332, U. S. Circuit Court of Appeals for Ninth District, page 42-43:

MR. CHESTER:. You made your objections to your classification right along. Now, I will ask you this: Were you ever questioned before the Board or before the Appeal Board as to your reasons for stating that your classification be properly in Class 4-D?

A. I never was requested by the Appeal Board.

Q. Did you ever appear before the full Board in a meeting, and were you examined?

A. No. I didn't go before the Board.

Q. Did you ever appear before the Appeal Board?

A. No.

Q. Were you asked to submit any evidence as to your status as a minister?

A. No, I gave them all of the evidence in my questionnaire.

MR. CHESTER: That is all.

At no time did the local board or appeal board take any evidence as to how other members of Jehovah's Witnesses regarded Jarmon Thomas Conway in respect to his status as a minister of their faith.

Assignment of Error No. IV

That the Honorable Court erred in sustaining the Government's objection to the introduction in evidence of Defendant's Exhibit A being some 47 affidavits of Jehovah's Witnesses affirming the fact that affiants regarded the defendant as a minister for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6 to appear for work under civilian direction was an unlawful order in that it violated the rules of the Selective Service System by wrong classification of a registrant and by the issuance of orders pursuant to such unlawful classification. Admission of said affidavits in evidence would tend to disprove intent to violate any lawful order of the Maricopa County Local Board No. 6 issued to the defendant. It is the contention of the defendant that the Court is not bound to convict and punish one for disobedience of an unlawful order by whomsoever made. (T.R.67-68).

Defendant's Exhibit A for identification were: (T.R.59-60).

Being 50 affidavits, signed by residents of Arizona, all duly subscribed and sworn to, to the effect that Jarmon Conway was a member of Jehovah's Witnesses and is regarded by affiants and others of the same faith as a duly ordained minister in the same manner

in which regular or duly ordained ministers of other religions are ordinarily regarded. (T.R.59-60).

Bowles vs. United States, 87 S. C. Law Ed 919; *U. S. vs. Johnson,* 126 Fed. (2nd) 242.

Assignment of Error No. V

The Honorable Court erred in denying the motion of the defendant for a directed verdict, said directed verdict having been requested by the defendant for the reason that the Maricopa County Local Board No. 6 to Glendale, Arizona had found the defendant fit for general service, which automatically put him into the class that should, under Selective Service Regulations, place him as an inductee in non-combatant service in the armed forces. The said Local Board, instead of following rules and regulations of the Selective Service Board, ordered the defendant to a conscientious objectors' camp. It has been held heretofore by the United States Circuit Court of Appeals for the Ninth Circuit that a conscientious objector, found fit for "general service" is required to obey only an order for induction for service into the land or naval forces and that a Local Board has no power to "assign" such registrant to work of national importance under civilian direction and order him to report to such authorities. The Circuit Court held that, "It is no violation of Section 11 of the Act to fail to obey an order which the Board had no power to make." (T. R. 68-69).

In the case of Robert Earl Hopper vs. United States, the Court held:

To constitute a crime under section 311 of the Act, the accused man must "knowingly fail or neglect to perform some duty required of him under this Act." 50 U.S.C.A. Sec. 311. In order to impose a duty on a registrant under the Act, the local Selective Service Board, hereafter called Board, must clasify him in one of three general classes; (a) as a combatant for "induction" into the land or naval forces of the United States (Act No. 4 (a), No. 3 (a), 50 U.S.C.A. 304, 303):

(b) as one whose claim that he is a conscientious objector has been "sustained" by the Board for "induction" into the land or naval forces for noncombatant service (Act, No. 5 (g), 50 U.S.C.A. 305), and (c) as to sub-class of conscientious objectors whom the Board has "found to be conscientiously opposed to participation in such (land or naval) noncombatant service," to be "assigned to work of national importance under civilian direction," (Act, No. 5 (g), footnote 2, supra).

As to conscientious objectors, it is apparent that they may be required to serve in noncombatant work either by induction into the land or naval forces or by assignment to work under civilian direction. Obviously, if a conscientious objector is "found" by the Board to be in class (b) above described he cannot be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fail to report for such service. Likewise, if in class (c) above described he cannot be required by the Board to be inducted to serve in the land or naval forces and if so ordered would violate no duty imposed by the Act if he failed to present himself for such induction.

Here the defendant was found "fit for general military Service": (R.T. C-6420-Phoenix-page 27).

MR. CHESTER: Q. Mr. Riordan, as to the service this man was qualified for, the Local Board, according to your testimony in a prior case held here, found that he was qualified for general military service, is that correct? (R. T. C-6420-25, 27, 28)

A. That is right, yes, sir.

Government's Exhibit No. 3 in evidence, report of physical examination, Jarmon Thomas Conway: (T.R.25) (T.R.27) (T.R.28).

October 25, 1941.

This local Board finds the person named above is Qualified for general military service 4 E.

J. F. BRAZILL,

Date 10-28-41.

I certify that I have carefully examined and reviewed the record of the examination of the person named herein and that it is my judgment and belief that he is

Qualified for general military service.
Place; Glendale, Arizona, Date October 25, 1941.

(Signed) M. I. LEFF, M. D.,
Examining Physician.

And the said witness Riordan testified further as follows:

By Mr. Walsh:

Q. Directing your attention to the first page of Government's Exhibit No. 3 in evidence, I will ask you if you know whose signature that is on the first page there.

A. That is the signature of J. S. Brazill, our Chairman of Local Board No. 6 at Glendale.

Q. Would you read the language appearing immediately above his signature there?

A. "This Local Board finds that the person named above is qualified for general military service 4-E. Date 10-28-41. J. S. Brazill, member of Local Board."

Mr. Walsh: May this be marked, please?

(The document was marked as Government's Exhibit 4 for identification.) (T.R.28).

—the defendant was ordered to serve under civilian direction. Under the law he violates no duty required of him under the Act if he fail to report for such service.

Assignment of Error No. VI

That the Honorable Court erred in refusing to give to the jury the defendant's requested instructions and further erred in the court's instruction to the jury to the effect that the defendant cannot offer as a defense that the order of the Board is arbitrary and capricious, this latter instruction patently violates the constitutional provisions guaranteeing due process of law and the right of freedom of the person and freedom of religion. Defendant duly excepted to the Courts failure to grant his requested instructions and to the Court's granting or giving instruction depriving defendant of defense where the Board acted in an arbitrary and capricious manner. (T.R. 69).

Defendant's requested instructions were as follows: (T.R.62-63).

1. The Selective Service Board cannot bind a registrant by any arbitrary classification against all of the substantial information before it as to his proper classification. Classifications by such agency must, under the powers given it by Congress be honestly made, and a classification made in the teeth of all substantial evidence before such agency is not honest but arbitrary.

2. An individual cannot be deprived of his rights of freedom of person even in war time, except through machinery which guarantees the fundamentals of "Due Process of Law" and a classification by a Selective Service Board not supported by any evidence is arbitrary and constitutes an abuse of discretion depriving defendant of due process of law and his right to freedom of religion guaranteed under the Constitution of the United States.

3. As to conscientious objectors, it is apparent that they may be required to serve in non-combatant work either by induction into the land or naval forces or by assignment to work under civilian direction. If a conscientious objector is found by the Board to be that of one whose claim that he is a conscientious objector has been sustained by the Board for "induction" into the land or naval forces for noncombatant service, he cannot be required by the Board to be assigned to serve under civilian direction, and violates no duty required of him under the Act if he fails to report for such service.

4. The provision that one who shall "knowingly" fail or neglect to perform duty required by Selective Service Act shall be subject to certain penalties implies wilful knowledge and a specific intent and defendants in selective service cases are permitted to give their reasons for failure to obey as going to intent.

(Which instructions were not given). (T.R.62-63).

The Court instructed the jury in part as follows: (T.R.63-64).

You are instructed that even if a Local Draft Board acts in an arbitrary and capricious manner, or denies a registrant a full and fair hearing, nevertheless the registrant must comply with the Board's order. The registrant may not disobey the Board's order and then defend his dereliction by collaterally attacking the Board's administrative acts. In other words, the registrant may not lawfully disobey the Local Draft Board's order to report for induction and then offer as a defense for his failure to comply with the Board's order, some arbitrary or capricious Act of the Board in determining his classification and issuing the order.

Any Exceptions? I have refused your requested instructions.

Mr. Chester: I take exceptions to the Court's refusal to give the defendant's requested instructions, and I also take exception to the instruction wherein the Court makes the statement on the decision of the Selective Service Board as being final except where an appeal is taken, and to the instruction that the defendant cannot offer as defense that the order of the Board is arbitrary and capricious, as that violates the due process of law and the provisions of the Constitution. (T.R.63-64).

Defendant's requested instructions followed the law and were proper. The instruction above cited and as given by the court was contrary to law.

U. S. vs. Johnson, 126 Fed (2nd) 242;
Angellus vs. Sullivan, 246 Fed 54;
Ex Parte Stewart, 47 Fed Supp. 410;
Boitano vs. District Board, 250 Fed. 812;
U. S. vs. Kinkead, 250 Fed 692;
St. Joseph Stockyards vs. U. S., 298 U. S. 38.

It follows that the Court should have directed the verdict and left the defendant where it found him subject under the law to the further orders of his Local Board.

It is respectfully submitted that the Judgment of the District Court should be reversed.

Dated, Phoenix, Arizona.
August 30, 1943.

W. H. CHESTER
Attorney for Appellant
412 Phx. Nat'l Bank Bldg.
Phoenix, Arizona.

No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF OF APPELLEE

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

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Assistant U. S. Attorney.

Attorneys for Appellee.

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE

An indictment was returned on the 28th day of January, 1943, charging the appellant with failure to perform a duty required of him under the Selective Training Act of 1940, 50 U. S. C. 311, in that he failed and neglected to report for work of national importance under civilian direction, having been duly assigned by his Local Board to work of national importance under civilian direction, and having been duly ordered and notified to report for said work of national importance under civilian direction (T. R. 2, 3, 4, 5).

A motion to quash the indictment was denied February 17, 1943 (T. R. 5, 6). The case was tried before a

jury on April 9, 1943. At the end of the trial, appellant made a motion for a directed verdict, which was overruled. The appellant was found guilty as charged (T. R. 6).

Notice of appeal was filed April 19, 1943 (T. R. 10).

Said appellant, Jarmon Thomas Conway, registered under the Selective Training and Service Act of 1940, Title 50 U. S. C. A. 301-311, on October 16, 1940 (T. R. 19). He was thereafter classified as IV-E by his Local Selective Service Board at Glendale, Arizona, on October 28, 1941, for the reason that he was a conscientious objector, from which classification appellant appealed to the Board of Appeals, which, on January 23, 1942, classified the appellant in Class IV, Subdivision E, by the following vote Ayes 5 noes 0 (T. R. 22). Appellant was thereafter assigned to work of national importance (T. R. 46), and subsequent thereto, on May 4, 1942, he was ordered to report for work of national importance to his Local Board on May 14, 1942 (T. R. 47). Appellant failed so to do (R. T. 22, 52).

Appellant, in addition to his statements in his questionnaire supporting the basis for his claim as a minister, also included therein the following (Government's Exhibit 2 in Evidence, T. R. 20, 21):

> "I am working at present time. The job I am working at now is nursery man. My duties are plant shrubbery, grade lawns, etc. I have done this kind of work for 2 years. * * * My employer is Norman Nurseries, 2508 N. Central Avenue, Phoenix, Arizona, whose business is Nursery Business. Other business or work in which I am now engaged is preaching the gospel. I am licensed as truck and tractor driver. I am not an apprentice. * * * Nursery man planting shrubs, Etc. 1937 to 1941."

Appellant also included in a special form for conscientious objectors, being Form 47, the following statements (T. R. 28, 30):

> "Farm work, Employer, Arthur W. Conway, Father, * * * 1936. Farm Work Employer Chas. Pearson, Paducah, Texas, 1936 to 1937. Farm Work J. C. Rodgers, 20th and Campbell Ave. 1937 to 1938. Farm Work, Norman Nurseries, 2508 N. Central, Phoenix, 1938 to 1941."

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in admission of certain evidence.

3. Whether the Court erred in denying motion of appellant for a directed verdict.

4. Whether the Court erred in instructing the jury.

SUMMARY OF ARGUMENT

In answering appellant's argument we will discuss the points raised in the order in which they are taken up in Appellant's Brief.

ASSIGNMENT OF ERROR NO. 1 (App. B. 18, 19)

This assignment has to do with the sufficiency of the indictment. That an indictment must charge each and every essential element of an offense is a well established principle of law. The authorities cited by appellant (App. B. 19) merely reaffirm this principle.

The indictment in this case contains allegations of all the elements of the cirme. It alleges that appellant registered under the Selective Training and Service Act of 1940, that he was classified by the Board as IV-E, that

he was a person liable for training and service under the said Selective Service Act, and that he was duly notified by said Board to report at a specified time and place for work of national importance under civilian direction, and that the action of said Local Board was pursuant to the power conferred upon it by the Selective Training and Service Act of 1940. The indictment further states that the said Local Board was created in Maricopa County, Arizona, under and by virtue of the provisions of said Act. The offense charged is that he failed to perform a duty required of him, namely, to report to his Local Board for work of national importance under civilian direction, as required to do by the said notice and order of his said Board.

50 U. S. C. 311.

The offense is directly alleged in the indictment (T. R. 2, 3), and fully informs the appellant of the nature of the charge so as to enable him to prepare his defense. It was also sufficiently definite to support a plea of former acquittal or conviction against another charge for the same offense. See the following cases:

Moore v. U. S., 128 Fed. 2d 974.
Zuziak v. U. S., 119 Fed. 2d 140 (9 Cir.).
Graham v. U. S., 120 Fed. 2d 543.
Woolley v. U. S., 97 Fed 2d 258 (9 Cir.).
Harvey Ward Crutchfield v. U. S., No. 10,200, 9 Cir.
U. S. v. Henderson (C. C. A. D. C. 1941), 121 Fed. 2d 75.
Potter v. U. S., 155 U. S. 438.
Summers v. U. S. (C. C. A. 4, 1926), 11 Fed. 2d 583; certiorari denied 271 U. S. 681.
Hewitt v. U. S. (C. C. A. 8, 1940), 110 Fed 2d 1, 6.
Hagner v. U. S., 285 U. S. 427, 431.
Beard v. U. S. (App. D. C.), 82 Fed. 2d 837, 840.

From a perusal of the indictment and a reading of the cases cited in support of our position, we believe the indictment is good and that the Court did not err in denying appellant's said motion to quash.

ASSIGNMENTS OF ERROR NOS. II AND III
(App. B. 19, 20, 27)

These assignments have to do with the appellant's objections to the admission in evidence of Government's Exhibits Nos. 7 and 11, and we will consider them together.

Government's Exhibit No. 7 is a letter from Mr. A. M. Tuthill, State Director of Selective Service for the State of Arizona, to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona (T. R. 43).

Government's Exhibit No. 11 is a letter from James Stokeley, Clerk of the Board of Appeals, Selective Service System, to Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, returning records in connection with the appeal of the appellant and affirming his classification in Class IV-E (T. R. 54).

At the trial before the District Court the appellant objected to the admission of said exhibits as being immaterial, which objections were overruled by the Court (R. T. 16, 44). The exhibits were not introduced by the Government during the trial for the purpose of proving or disproving the status of the appellant as a minister, nor were they introduced upon the issue of whether or not the appellant should have been classified IV-E or IV-D, but were introduced only for the purpose of showing to the Court and the jury the parts of the record that were before both the Local Board and the Appeal Board at the time of their respective hearings re-

garding the classification of appellant, and to further show that the respective boards really considered his case upon the record contained in appellant's file.

We therefore contend that the exhibits were material to the issues before the Court and that the Court did not err in overruling appellant's objections.

ASSIGNMENT OF ERROR NO. IV (App. B. 29)

This assignment of error claims that the Court erred in sustaining the Government's objection to the introduction in evidence of appellant's Exhibit A, being some 47 affidavits of Jehovah's Witnesses affirming the fact that the affiants regarded the appellant as a minister, for the reason that such affidavits would tend to prove that the order of the Maricopa County Local Board No. 6, directing the appellant to appear for work of national importance under civilian direction, was unlawful in that it violated the rules of the Selective Service System by wrong classification of a registrant and issuance of orders pursuant to such unlawful classification. We do not believe there is any merit to appellant's contention under his Assignment of Error No. IV for the reason that the appellant cannot disobey the Board's orders and then defend his dereliction in a criminal trial by collaterally attacking the Board's administrative acts, and we cite the following cases in support of the above premise:

U. S. v Grieme (C. C. A. 3), 128 Fed. 2d 811.
Rase v. U. S. (C. C. A. 6), 129 Fed. 2d 204.
U. S. v. Kauten (C. C. A. 2), 133 Fed. 2d 703.
U. S. v. Mroz (C. C. A. 7), 136 Fed. 2d 221, decided June 3, 1943 (Advance Sheet, August 16, 1943).

It is obvious upon a reading of the above-cited cases that the Court committed no error in sustaining the

Government's objection to the introduction in evidence of appellant's Exhibit A.

ASSIGNMENT OF ERROR NO. V (App. B. 30)

Appellant bases this assignment of error upon the grounds that the Court erred in denying motion of appellant for a directed verdict, said directed verdict having been requested by the appellant for the reason that appellant's Local Board had found him fit for general service (T. R. 25, 26, 27), which automatically put the appellant under the Selective Service regulations as an inductee in the non-combatant service in the armed forces.

We are unable to understand the premise upon which the appellant bases his Assignment of Error No. V. The indictment in this case specifically alleges that the appellant was classified IV-E by his Local Board (T. R. 2); the record shows that the appellant was classified IV-E by his Local Board (T. R. 22), which classification was also made by the Appeal Board (T. R. 22); and he was assigned to work of national importance under civilian direction (T. R. 46) for the reason that he was conscientiously opposed to both combatant and non-combatant military service. This was mandatory under and by virtue of Regulation 622.51 of the Selective Service Manual, which Regulation makes it mandatory that every registrant who has been classified IV-E be available for work of national importance.

From the pleadings, the record, and the transcript of evidence in this case, we argue most strenuously that the Court properly denied appellant's motion for a directed verdict.

ASSIGNMENT OF ERROR NO. VI (App. B. 33)

The appellant claims in his Assignment of Error No. VI that the Court erred in refusing to give to the jury the defendant's requested instructions, and further erred in the Court's instructions to the jury to the effect that the defendant cannot offer as defense that the order of the Board is arbitrary and capricious, and in support thereof cites certain cases (App. B. 35), which we have read and find that they are of no assistance in determining the issues raised by appellant under his said assignment of error. However, the case of *Ex parte Stewart, 47 Fed. Supp. 410,* one of the cases cited by appellant, clearly holds that the method to be taken advantage of in cases of this nature is under and by virtue of a writ of habeas corpus because of the fact that no question of the action of the Board is allowed in a prosecution resulting from disobedience of any orders issued by the Board.

It is our contention that the Judge's instruction (R. T. 58, 59), claimed as error by appellant in this case, correctly states the law, and in support of the instruction we cite the following cases:

Ex parte Stewart, supra.
U. S. v. Johnson (C. C. A. 8), 126 Fed 2d 242-246.
U. S. v. Grieme, supra.
Rase v. U. S., supra.
U. S. v. Kauten, supra.

We also contend that from the cases cited above the appellant's requested instructions did not correctly state the law, and that the Court did not commit error in refusing to give his instructions to the jury.

SUMMARY

The indictment was sufficiently definite to inform appellant of the nature of the charge and to support a plea of former jeopardy.

The Court did not err in the reception or rejection of evidence.

The Court properly denied appellant's motion for a directed verdict.

Appellant had a fair and impartial trial, and the verdict and judgment should be affirmed.

Respectfully submitted,

FRANK E. FLYNN,
United States Attorney,
District of Arizona.

E. R. THURMAN,
Assistant U. S. Attorney,

Attorneys for Appellee.

No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona

---

REPLY BRIEF OF APPELLANT

W. H. CHESTER
Attorney for Appellant,
412 Phx. Nat. Bank Bldg.
Phoenix, Arizona

REPUBLIC AND GAZETTE COMMERCIAL PRINTERY, PHOENIX, ARIZONA

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No. 10414

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JARMON THOMAS CONWAY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF OF APPELLANT

Reply to brief of appellee herein will follow appellee's statements as to questions presented which is as follows:

QUESTIONS PRESENTED

1. Whether the indictment is defective.

2. Whether the Court erred in the admission of certain evidence.

3. Whether the Court erred in permitting testimony of a certain Government witness.

4. Whether the Court erred in instructing the jury.

ASSIGNMENT OF ERROR NO. 1

This asignment has to do with the sufficiency of the indictment. Appellee claims that every essential element of the offense has been set forth in the indictment. It has been heretofore called to the attention of the Court that the aforesaid indictment does not at any place state that Maricopa County local board No. 6 of the Selective Service System located in Glendale, Arizona, had jurisdiction over the defendant herein. Nor is it shown under the said indictment that the said Selective Service Board followed the laws, rules and regulations and orders of the Selective Service and Training Act of 1940 and Amendments thereto. It is the contention of the defendant that the jurisdiction of the Board and its adherence to the law under which it acted is a necessary part of the indictment to show that an offense was committed.

ASSIGNMENT OF ERROR NO. II AND III

This assignment has to do with the appellant's objections to the admission in evidence of Government's Exhibits No. 7 and 11.

As to Government Exhibit No. 7, which is a letter from Mr. A. M. Tuthill, State Director of Selective Service for the State of Arizona to J. S. Brazill, Chairman, Maricopa County Local Board No. 6, Glendale, Arizona (T. R. 43). The appellant herein reiterates that the said letter was immaterial and its admission was prejudicial to the defendant in that the letter mere-

ly states the name of Jarmon Thomas Conway does not appear in the official list of Jehovah's Witnesses, known as Bethel Family or as Pioneers, as furnished the local Board by National Headquarters of Selective Service System. It is a contention of the appellant that the method of determining whether or not a member of Jehovah's Witnesses is an ordained minister should properly be in accordance with the Volume 3, Opinion 14 of National Headquarters Selective Service System which states that each case must be determined upon its own merits with due regard to the way in which other members of Jehovah's Witnesses regard the status of the particular member in connection with his ministerial status and that "Whether or not they stand in the same relationship as regular or duly ordained ministers in other religions *must be* determined in each individual case by the local board, *based* upon whether or not they devote their lives in the furtherance of the beliefs of Jehovah's Witnesses, whether or not they perform functions which are normally performed by regular or duly ordained ministers of other religions, and finally, whether or not they are regarded by other Jehovah's Witnesses in the same manner in which regular or duly ordained ministers of other religions are ordinarily regarded."

Volume 3, Opinion 14, Section 6, Selective Service System of National Headquarters provides as follows:

"In the case of Jehovah's Witnesses as in the case of all other registrants who claim exemption as regular or duly ordained ministers, the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

We call the Court's attention to the fact that the language of Volume 3, Opinion 14, Section 6 of Selective Service System of National Headquarters signed by Louis B. Hershey, Deputy Director, makes it mandatory that "the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision."

Here the local Board's decision is based not upon what the National Headquarters of Selective Service System order such findings to be based upon but upon a mere negative finding by A. M. Tuthill, State Director of Selective Service for the State of Arizona, that he does not find Jarmon Thomas Conway's name on a certain list. It is the contention of the appellant that this is in violation of the rules and regulations of the Selective Service System and that the order of the local Selective Service Board is unlawful and void. Consequently, Government Exhibit No. 7 was immaterial and prejudicial to the defendant.

Government Exhibit No. 11 was a letter from James Stokeley, Clerk Board of appeals, Selective Service System to Chairman of Maricopa County Local Board No. 6, Glendale, Arizona, without appearance of Jarmon Thomas Conway, and it is the contention of the appellant that it was immaterial in determining any fact in connection with the case.

ASSIGNMENT OF ERROR NO. IV

It is the contention of the appellant herein that no hearing was ever had that would comply with the laws, rules and regulations of the Selective Service System to determine whether or not appellant was or was not

a duly ordained minister. Volume 3, Opinion No. 14 Section 6 of National Headquarters Selective Service System provides as is set forth in full above that "the local board shall place in the registrant's file a record of all facts entering into its determination for the reason that it is legally necessary that the record show the basis of the local board's decision." The local Selective Service Board failed to heed or to follow Volume 3, Opinion 14, Section 6, of the Selective Service System rules and regulations of National Headquarters of Selective Service System in this instance, and it is the contention of the appellant that orders made for defendant to appear for assignment of work of national importance was unlawful, invalid and void.

The forty-seven (47) affidavits tendered by appelletarian contend to prove the lack of fair hearing by the Board in consideration of proper evidence tendered and offered by appellant and would also prove that the local Selective Service Board No. 6, Maricopa County, Arizona, made their order without sufficient evidence upon which to base said order.

ASSIGNMENT OF ERROR NO. V

This asignment is based upon the contention of the appellant that the Court erred upon denying motion of appeal for directed verdict.

Appellant contends that the local Board found him fit for general service which automatically put appellant under Selective Service Act as an inductee in the combatant forces in the service of the United States, and that he was not therefore subject to the Board ordering him to work in work of national importance.

Robert Earl Hopper vs. United States of America No. 10,110, Dec. 18, 1942, Circuit Court of Appeals for the Ninth District.

Appellant further calls the court's attention to Section 623.51 of Selective Service System Rules and Regulations which provide that:

"After physical examination, the report of the examining physician shall be considered, and the registrant shall be classified in accordance with various subsections of the aforesaid section 623.51 under which under (e) (2) "if registrant has been found to be a conscientious objector to both combatant and noncombatant military service, he shall be classified in Class IV-E."

It is therefore apparent that the classification in 4-E should be a separate finding of the board subsequent to the physical examination of the registrant. The records clearly show that this was not the procedure in this instance.

ASSIGNMENT OF ERROR NO. VI

The Appellant herein claims that the Court erred in refusing to give to the jury the defendant's requested instructions. The appellee contends that the appellant's requested instructions did not correctly state the law, and that the Court did not commit error in refusing to give his instructions to the jury. We respectfully call the Court's attention that each of the said instructions was prepared by following the language of the court in the cases set forth below.

Instruction No. 1 follows the case of Angelus v. Sullivan, 276, Fed. 54.

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Instruction No. 2 follows the case of Ex Parte Stewart, 47 Fed. Supp. 410

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Instruction No. 3 follows the case of Robert Earl Hopper vs. U. S., U. S. C. C. A. for Ninth Circuit No. 10,110.

Instruction No. 4 is a general rule of law that has been developed under the selective service cases.

The Court's instruction as given to the jury is in direct contravention to the rule of law as laid down in the case of St. Joseph Stockyards vs. United States, 298 U. S. 38 wherein the Court said,

> "But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That the prospect with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty."

It is the contention of the appellant that it is no violation of Section 311 of the Selective Service and Training Act of 1940 to fail to obey an order which, under the laws, rules and regulations of the Selective Service Act of 1940 the local selective service board had no power to make.

Robert Earl Hopper v. U. S.
U. S. Circuit Court of Appeals
for the Ninth Circuit, No. 10,110.

SUMMARY

The indictment was insufficient.

The court erred in the reception and rejection of evidence.

The court erred in denying the appellant's motion for a directed verdict.

The court erred in instructing the jury.

Respectfully submitted.

W. H. CHESTER
Attorney for Appellant,
412 Phx. Nat. Bank Bldg.
Phoenix, Arizona

No. 10424

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOHN O. ENGLAND, Trustee of the Estate of James Nyhan, Bankrupt,

Appellant,

vs.

DAVID NYHAN,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

No. 10424

United States

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California.

No. 34467-R

In Bankruptcy

In the Matter of

JAMES NYHAN, also known as JAMES P. NYHAN, also known as JAMES PAUL NYHAN, also known as DICK NYHAN,

Bankrupt.

CERTIFICATE AND REPORT OF REFEREE ON PETITION FOR REVIEW OF REFEREE'S ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING ORDER TO SHOW CAUSE .

To Honorable Michael J. Roche, United States District Judge for the Northern District of California:

I, Burton J. Wyman, one of the referees in bankruptcy of this court, and the referee in charge of this proceeding, respect- [1*] fully certify and report:

There has been filed herein, on behalf of the trustee in bankruptcy, the following verified petition for review:

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*Page numbering appearing at foot of page of original certified Transcript of Record.

"The petition of John O. England respectfully shows:

"1. That your petitioner is the duly elected, qualified and acting Trustee of the above named bankrupt;

"2. That heretofore and on the 10th day of November, 1942, your petitioner filed herein a verified petition for an order authorizing your petitioner to sell a certain taxi license or permit standing in the name of the above named bankrupt permitting the holder of said taxi license or permit to operate*d* eight taxicabs in the City and County of San Francisco, State of California, free and clear of any claim of David Nyhan, alias, and an order to show cause issued thereon and served on said David Nyhan, which order to show cause and petition was returnable before the above entitled court on the 2nd day of December, 1942, and was duly and regularly continued from said date for hearing to the 9th day of December, 1942, and that said respondent David Nyhan served and filed his answer objecting to the summary jurisdiction of the above entitled court and requesting an order quashing service of the order to show cause;

"That thereupon a minute order was entered on the 9th day of December, 1942, sustaining the plea to the jurisdiction and quashing the order to show cause, and that thereafter, on the 11th day of December, 1942, an order was entered sustaining the plea to the jurisdiction and

quashing the order to show cause, in words and figures [2] as follows:

" 'In the District Court of the United States for the Northern District of California, Southern Division.

No. 34467 R

In the Matter of JAMES NYHAN, also known as JAMES P. NYHAN, also known as JAMES PAUL NYHAN, also known as DICK NYHAN,

Bankrupt.

ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING OF ORDER TO SHOW CAUSE.

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the trustee appearing by his attorneys, and the respondent appearing by his attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisediction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its

minute order sustaining said plea of said respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said respondent be, and the same is hereby quashed.

Dated the 11th day of December, 1942.

BURTON J. WYMAN,

Referee in Bankruptcy'

"That said order is erroneous for the following reasons:

"That said order is contrary to the facts and law in that the uncontroverted evidence shows that prior to the filing of the petition in bankruptcy, which said petition was filed on November 17, 1941, said bankrupt attempted to assign and transfer said taxi license or per- [3] mit to his brother David Nyhan, alias, said respondent; that under the provisions of the ordinances of the City and County of San Francisco, said license is transferable only with the consent of the Police Commission of said City and County, and that upon the 10th day of November, 1941, an application was made by respondent David Nyhan, alias, and said

bankrupt pursuant to said municipal ordinance of the said City and County of San Francisco, to the Chief of Police and the Police Commission of said City and County for an order permitting said transfer and assignment of said permit, and the certificate for said permit was filed with said Chief of Police of said City and County with said application;

"That thereafter and subsequent to the filing of the petition in bankruptcy said Chief of Police and Police Commission denied and refused to permit the transfer of said taxi permit and license and that the same was redelivered by said Chief of Police to said bankrupt and his receipt obtained therefor;

"That thereafter an appeal was taken by said David Nyhan, alias, said respondent and said bankrupt, to the Board of Permit Appeals of the City and County of San Francisco, which said board thereafter sustained said ruling denying the transfer of said permit;

"That the Referee's order on the foregoing facts denying jurisdiction for the summary order requested by the trustee to sell free and clear of any claim of David Nyhan, alias, said respondent, is contrary to the law in that said taxi permit or license at the time of the filing of the petition in bankruptcy was in the possession of the bankrupt and was an asset of the estate and there- [4] fore subject to the summary jurisdiction of the Referee;

"That the order of the Referee sustaining the objections to the summary jurisdiction of the Referee, cannot be sustained in law on the evidence adduced.

"Wherefore, your petitioner prays for a review of the said order by the Judge of this Honorable Court, and that said order be vacated and set aside, and that the Referee be directed to enter an order denying the plea of the respondent to the jurisdiction of the Referee, and to decide the controversy on its merits and in accordance with the facts and law.

"JOHN O. ENGLAND,
"JOHN O. ENGLAND,
Petitioner.
"B. H. MULDARY,
"DINKELSPIEL &
DINKELSPIEL,
"DINKELSPIEL &
DINKELSPIEL,
"Attorneys for Trustee."

[Verification omitted for sake of brevity.]

(See original of said petition, handed up herewith as a part of this certificate and report.)

The verified petition referred to in said petition for review reads as follows:

"Comes now John O. England, and respectfully represents:

"That on or about the 17th day of November, 1941, an involuntary petition in bankruptcy was filed in the District Court of the United

States for the Northern District of California, Southern Division, against Respondent James Nyhan, also known as James P. Nyhan, also known as James [5] Paul Nyhan, also known as Dick Nyhan, and that thereafter such proceedings were had that on or about the 11th day of June, 1942, said James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, was duly adjudged to be a bankrupt in accordance with the provisions of the Acts of Congress relating to bankruptcy, and that thereafter and or about the 20th day of August, 1942, your petitioner was duly appointed as Trustee of said bankrupt's estate, and thereupon duly qualified as, and has since been and now is the duly appointed and acting Trustee of the estate of the above-named bankrupt.

"That your petitioner is informed, believes, and therefore represents that on and before said 11th day of November, 1941, at the time said petition in bankruptcy was filed in said district as aforesaid, the above-named bankrupt was the owner of and entitled to the possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, under and by virtue of the Ordinances of said City and County of San Francisco, authorizing and permitting said bankrupt to operate eight taxi cabs for hire on the streets of said City and County

and State, naming James Nyhan, doing business as 'California Cab Co.' as licensee.

"That your petitioner is informed, believes, and therefore represents, that Respondent David Nyhan, claims an interest in said above-described taxi license but that as a matter of fact, has no such interest in law or equity.

"That said Respondent David Nyhan and Respondent bankrupt have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or [6] trustee for said Respondent bankrupt.

"That by reason of the premises your petitioner is informed, verily believes, and therefore represents, that the said personal property was, at all times herein mentioned and still is, a part of the assets of the estate of said bankrupt and subject to administration herein as part of said estate.

"That your petitioner represents that unless this Honorable Court enter its temporary restraining order herein forbidding any transfer or encumbrance of that certain personal property above-described by the said Respondent, until this matter is finally determined by this Court, that said personal property will be forever lost to this bankrupt estate.

"Wherefore, your petitioner prays for an Order authorizing and directing him as Trustee, to administer upon and to sell, in the manner prescribed by law, said above-described taxi

license, as part of the assets of the estate of the bankrupt above-named free and clear of any property liens, claim, right, title, or interest of said Respondents; and that pending the hearing of this petition and until this matter is finally determined by this Court the Respondents, and each of them, be restrained from transferring or encumbering said personal property and for such other and further order and or relief as may be meet and proper in the premises.

"Dated: This 10th day of November, 1942.

"JOHN O. ENGLAND,

"JOHN O. ENGLAND,
Trustee.

"DINKELSPIEL & DINKELSPIEL,

"DINKELSPIEL & DINKELSPIEL,
"Attorneys for Trustee." [7]

[Verification omitted for sake of brevity.]

(See original of said last mentioned petition, handed up herewith as a part of this certificate and report.)

The order to show cause, also referred to in said petition, avers:

"Upon consideration of the annexed duly verified petition of John O. England, Trustee herein, for an Order authorizing the sale of personal property and good cause appearing therefor, now on motion of Messrs. Dinkelspiel

& Dinkelspiel, Attorneys for said Trustee herein, it is hereby

"Ordered, that James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and David Nyhan, and each of them, do personally be and appear before the undersigned Referee in Bankruptcy at the office of Burton J. Wyman, Room 604, Grant Building, at San Francisco, California, in said District, at the hour of 2:00 o'clock P.M. on the 17th day of November, 1942, then and there to show cause, if any, or each of them and why the prayer of said annexed Trustee's petition should not be granted; and it is further

"Ordered, pending the hearing of this Order to show cause and until further ordered of this Court, the Respondents and each of them, are hereby restrained from in any way selling, transferring, on encumbering the personal property described in said annexed petition; and it is further

"Ordered, that service of this Order be made by delivering to said Respondents, and each of them, a duly [8] certified copy of this Order, together with a true copy of said annexed Trustee's Petition, at least 2 days prior to the aforesaid hearing hereof.

"Dated: This 10 day of November, 1942.

"BURTON J. WYMAN,

"Referee in Bankruptcy"

(See original of said order, handed up herewith as a part of this certificate and report.)

On December 5, 1942, there was filed on behalf of the respondent, David Nyhan, the following verified plea to the Court's jurisdiction:

> "Now comes, David Nyhan, of the City and County of San Francisco, State and District aforesaid, Respondent to an order to show cause issued by the above entitled Court on the 11th day of November, 1942 and returnable on the 2nd day of December, 1942 and continued until December 9, 1942, and appearing specially and not otherwise for the purpose of objecting to the summary jurisdiction of the above entitled court and moving said court for an order quashing the service of said order to show cause, and for grounds of his plea objecting to the jurisdiction of the above entitled court alleges:
>
> "1. That it affirmatively appears from the petition of the Trustee, John O. England, upon which said order to show cause was issued by the above entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters therein stated or to make [9] any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to

submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said Trustee's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said Trustee's petition.

"2. That it affirmatively appears from the face of said Trustee's petition and the order to show cause issued by the above entitled court, that the facts stated in said Trustee's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

"3. That it affirmatively appears from said trustee's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the Trustee seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said Trustee herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent, without the consent of this respondent.

"That this respondent is entitled to have said issue determined in a plenary action and to have a trial by jury of the issues raised in said petition pursuant to his demand.

"For a further, separate and distinct objection [10] to the summary jurisdiction of the

above entitled court, this respondent alleges as follows, to-wit:

"That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee's petition.

"Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for respondent, David Nyhan.

"Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is a part of the assets of said bankrupt's estate.

"Respondent alleges that any order granting the prayer of the Trustee herein would be in excess of the jurisdiction of the above entitled Court.

"Wherefore, Respondent prays that service of the order to show cause issued by the above entitled Court may be ordered quashed on account of lack of jurisdiction of the above en-

titled Court to have issued said order to show cause.

"DAVID NYHAN,
"David Nyhan, Respondent"

[Verification omitted for sake of brevity.]

[11]

(See original of said "plea", handed up herewith as a part of this certificate and report.)

When the aforesaid petition for order authorizing sale of the said personal property finally came on for hearing, on December 9, 1942, I was attended upon by Ernest J. Torregano, Esq., representing Messrs. Torregano & Stark, the attorneys for the bankrupt; Martin J. Dinkelspiel, Esq., representing Messrs. Dinkelspiel & Dinkelspiel, which said law firm, with B. H. Muldary, Esq., (who also was present), are the attorneys for the trustee, Phillip S. Matthews, Esq., the attorney for certain creditors, and Bernard Nugent, Esq., the attorney for the respondent, David Nyhan.

During the course of the aforesaid hearing, the following proceedings were had:

"The Referee: You may proceed with the Order to Show Cause in the Nyhan matter.

"Mr. Dinkelspiel: I might state, if the Court please, that in accordance with Your Honor's order, an answer was filed. I don't know whether or not Your Honor has read it, but it is a plea to the jurisdiction.

"The Referee: Yes, I have read it.

"Mr. Muldary: If the Court please, at this time I would like to introduce in evidence a section I have here of the San Francisco Municipal Code, codified in 1939, introducing in evidence Section 1079 of the Police Code, which is the portion of the Police Code which has to do with the granting of applications for taxicab licenses and particularly I call the Court's attention at this time to that sentence in Section 1079 which provides: [12]

> " 'All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the fee required of the new applicants.'

I should like permission to introduce the Police Code in evidence and have the court reporter copy this section and then withdraw the volume.

> " 'Police Code. Section 1079. Continuous Operation—Revocations Provided For. All persons, firms, or corporations within the purview of Sections 1075 to 1081 inclusive, of this Article shall regularly and daily operate his or its licensed motor vehicle for hire business during each day of the license year to the extent reasonably necessary to meet the public demand for such motor vehicle for hire service. Upon abandonment of such business for a period of ten (10) consecutive days by an owner or operator, the Police

Commission shall, after five (5) days' written notice to the said owner or operator, direct the Police Department of the City and County of San Francisco to revoke said owner's or operator's licenses or permits, and said licenses or permits shall forthwith be revoked. All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the free required of the new applicants. Any and all such certificates [13] of public necessity and convenience, permits and licenses and all rights herein granted may be rescinded and ordered revoked by the Police Commission for cause.'

I would like to call James Nyhan.

"JAMES NYHAN

Called for the Trustee, sworn.

"The Referee: This is strictly on the question of the plea to the jurisdiction?

"Mr. Dinkelspiel: Yes, Your Honor.

"Mr. Muldary: Q. What is your name?

"The Witness: A. James Nyhan.

"Q. Where do you reside?

"A. 1080 Eddy.

"Q. You are the bankrupt in this proceeding, are you not? A. I am.

"Q. Now, Mr. Nyhan, you were granted by the Chief of Police of the City and County of

San Francisco a Police Department permit No. 386, which has been introduced in evidence on a hearing in the Federal Court and is Petitioner's Exhibit No. 15 in that proceeding. Were you not granted such a permit? I will show you the permit to which I refer.

"A. Yes, I was granted it.

"Q. Referring to Permit No. 386 in the name of James P. Nyhan, California Cab Numbers 81, 82, 83, 84, 85, 86, 87 88; address 527 Woolsey Street; dated August 2nd, 1937.

"Mr. Muldary: I offer that in evidence as the Trustee's exhibit.

"The Referee: Very well; Trustee's Exhibit No. 1.

"Mr. Muldary: Q. After you were granted this permit [14] in 1937, Mr. Nyhan, did you proceed to exercise your rights under the permit by operating a number of taxicabs?

"A. Until they were repossessed, yes.

"Q. And, thereafter, did you make application to the Police Commission for permission to transfer this license or permit to your brother David Nyhan? A. Yes.

"Q. And when did you make that application? I suggest to you it was made November 10,1941.

"A. Well, I attempted to transfer them to my brother about a week after he arrived here from the East, which I believe, was in 1939 or 1940. The Sergeant of Police in charge of the Bureau of Permits, Sergeant Trainor, would

not allow me to make the application, although I had a perfect right under the law to do so. I finally had to go to the Chief of Police himself and explain to him that I had attempted to transfer those permits a good number of times, not once, but five or six times, because my brother insisted on it. I explained to the Chief of Police, Charley Dullea; I said, "Sergeant Trainor won't even let me put in the application'; so, Dullea says, 'He cannot do that; you have a right to do it.' I said, 'I know that; that is why I am here to see you.' So, he instructed Sergeant Trainor to let me put in the application, which the Chief ruled on.

"Q. Prior to putting in such application, did you endorse the permit on the reverse side?

"A. Yes, immediately.

"Q. What did you write on the reverse side of the permit?

"A. Well, as I explained in this court before, the procedure of the Police Department—

"Q. The question, Mr. Nyhan, is what you wrote on the back [15] of the permit?

"A. I am trying to explain to you and I will get to that.

"Q. I don't care for the explanation.

"A. I would like to explain it, Your Honor.

"Mr. Nugent: We object to that on the ground that the best evidence is the permit.

"The Referee: I think that is true.

"Mr. Muldary: If the Court please, the bankrupt has testified under 21 (a) that he

endorsed the permit on the back, 'James Nyhan' and subsequently tore off the signature, so the permit is not the best evidence, that evidence having been destroyed.

"The Referee: He may testify.

"The Witness: Can I explain?

"The Referee: You may explain after.

"A. Well, that is what I want to do.

"Mr. Muldary: What I want you to do is answer the question.

"The Referee: Q. What did you endorse on it?

"The Witness: A. I endorsed it with my name, which is the procedure of the Police Department. When you transfer a permit, you go before the Bureau of Permits and endorse the back of it; they take it, put it through the regular channels and at the next hearing, it is transferred from whoever it is to the new party.

Mr. Muldary: Q. Now, in connection with this endorsement and attempted transfer of the permit to your brother, Mr. Nyhan, was an application made to the Chief of Police for permission to transfer this permit to your brother, David Nyhan?

"A. Was an application made? [16]

"Q. Was an application made?

"A. Yes, it was made, after Sergeant Trainor would not allow me to.

"Q. I will show you a document dated November 10, 1941, entitled, "Application for

Permit to Engage in Business of Operating Vehicles for Hire', which is an exhibit in the Federal Court in the bankruptcy proceeding entitled, 'Petitioner's Exhibit No. 5, February 20, 1942' and ask you if that is the application to which you refer?

"A. I imagine so. Yes, I think so.

"Q. I call your attention to the fact that it is signed, 'David Gerald Nyhan'. Is that your brother's name? A. Yes.

"Q. Is that his signature? Do you recognize it? A. Well, I don't know.

"Q. Did you see him sign it?

"A. Well, he was there. I imagine that is his.

"Mr. Torregano: The question counsel asked is, 'Did you see him sign it?'

"A. No, I didn't see him sign it. Him and I was there together. That is a long time to remember. No one else was in the room, so, sure, it must be him.

"Mr. Muldary: Q. Does that appear to be his signature?

"A. It looks like his signature.

"Q. Your answer is, that is the permit to which you refer in your testimony?

"A. I believe it is.

"Q. I call your attention to the documents attached thereto, all of which are part of the same exhibit in the Federal Court, one of which is a petition for a Certificate of Public Convenience and Necessity to operate Eight

Taxicabs; another is a Certificate of Public Convenience and Necessity: [17]

" 'David G. Nyhan, To purchase of James P. Nyhan, California Cab Co., Nos. 81, 82, 83, 84, 85, 86, 87 and 88. (8 permits).'

Another of which is a receipt:

" 'Received from Bureau of Permits, permit for the operation of eight (8) taxicab permits, which was filed for the purpose of transfer, said transfer being denied November 17, 1941. Signed: James Nyhan.'

"Another of which is Notice of Decision from the Board of Permit Appeals of the City and County of San Francisco signed by C. J. Auger, President and Thos. W. McCarthy, Secretary, which says:

" 'The appeal of Jas. Nyhan from the order of Chas. W. Dullea, denying Appellant the right to transfer TAXICAB PERMIT TO DAVID NYHAN ON NOVEMBER 17, 1941, came on regularly for hearing before the Board of Permit Appeals December 2nd, 1941, and after such hearing the said order was CONCURRED.

Dated at San Francisco, California, December 2nd, 1941.'

"I offer that in evidence.

"The Referee: Trustee's Exhibit No. 2.

"Mr. Muldary: Q. Now, was that application for permission to transfer these permits to your brother denied by the Police Department?

"The Witness: A. Yes.

"Q. And when was it denied?

"A. Well, a week later, two weeks later; something like that. [18]

"Q. I call your attention to the fact that the Notice of Decision attached to the permit states that the order was made November 17, 1941. Does that refresh your memory? Do you recall whether that is it?

"A. Well, even to the Chief, generally, you make an application and it is on the calendar the next week. The Chief denied it, saying he would not transfer it to the Yellow Cab or wouldn't transfer it to David Nyhan, and then it was appealed and went to the other place up to the City Hall April first, and they took a little time too, and denied it.

"Q. This document from the Board of Permit Appeals, City and County of San Francisco, states that the application was denied on November 17, 1941. Is that your recollection?

"A. Well, I don't know. I know if that is what it says, it must be right.

"Q. And the appeal was denied December 2nd, 1941?

"A. If that what the record says, it must be right.

"Q. The petition in bankruptcy was filed on December 2nd, 1941, too?

"A. I don't know.

"Q. Now, after the denial of the transfer

of the permits, Mr. Nyhan, these documents were returned to you, were they not?

"A. Well, they were returned to me. Sergeant Trainor, as I said before, that is the first time, Your Honor, if I may say it, anybody ever had to sign a receipt for a permit, the return of a permit. It is not the usual procedure and I don't know who instructed Sergeant Trainor to do it.

"Mr. Muldary: If Your Honor please, I don't want to encumber the record with objections, but I ask that he be [19] instructed to answer the question.

"The Referee: Answer the question.

"Mr. Nugent: Mr. Muldary, may I see that, please?

"Mr. Muldary: Yes.

"Q. These documents, including your permit, were returned to you by the Police Department, were they not?

"The Witness: A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to anybody but the one the permits were in, James Nyhan. I was there, my brother was there. We both received it.

"Q. You gave the Bureau of Permits a receipt, which you signed, for the return of permits for the operation of eight taxicabs?

"A. Yes.

"Q. That is your signature, is it not?

"A. Yes. Which, Your Honor, is highly irregular. They never do it; I don't know why they did it in this case.

"Mr. Dinkelspiel: We move that that go out as the opinion of the witness.

"Mr. Nugent: If Your Honor please, I deem it the right of the witness to make an explanation.

"The Referee: It is part of his explanation and may stand.

"Mr. Dinkelspiel: The trustee rests.

"Mr. Muldary: The trustee rests.

"(Trustee rests.)

"The Referee: The objection to the jurisdiction may be sustained.

"Mr. Dinkelspiel: Will Your Honor give us an opportunity to submit authorities? [20]

"The Referee: No, sir. You have rested and it is sustained.

"Mr. Nugent: Thank you, Your Honor."

(See original of Reporter's Transcript, handed up herewith as a part of this certificate and report.)

(The permit placed in evidence as Trustee's Exhibit No. 1, Reporter's Transcript, page 4, page 14 of this certificate and report, reads:

"8 15 Permits.

"Permit Number 386

Date Granted August 2, 1937

POLICE DEPARTMENT PERMIT
CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

In conformity with the provisions of Ordinance No. 6979, New Series, of the City and County of San Francisco, State of California, permission is hereby granted to

Name James P. Nyhan

California Cab Co. Nos. 81, 82, 83, 84, 85, 86, 87 & 88.

Fictitious Name ~~White Cab Co. Nos. 500, 501, 502, 503, & 504.~~

Address 527 Woolsey St.

To operate vehicles for the transportation of persons for hire.

Issued by

[Seal] CHAS. F. SKELLY.

~~THE BOARD OF POLICE COMMISSIONERS~~

DEPUTY CHIEF OF POLICE

Chief of Police ~~By ..... Secretary."~~)

[21]

Subsequently, and on December 11, 1942, the following formal, written order was signed and filed by me:

"The verified Petition of John O. England, the Trustee, for an Order to Show Cause di-

rected to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his Attorneys, and the Respondent appearing by his Attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said plea of said Respondent to the jurisdiction of the above entitled Court;

"It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of Respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said Respondent be, and the same is hereby quashed.

"Dated: the 9th day of December, 1942.

"Signed Dec. 11, 1942.

"BURTON J. WYMAN

"Referee in Bankruptcy

[22]

"APPROVAL OF ORDER AS TO FORM

"Pursuant to Rule 22 of the above entitled Court the foregoing proposed order is not approved as to form.

"Dated: Dec 11th 1942

"BEN C. MULDARY
"DINKELSPIEL &
DINKELSPIEL
"Attorneys for John O. England, Trustee

"REASONS FOR NOT APPROVING THE FOREGOING PROPOSED ORDER:

"(1) That Petitioner John O. England, Trustee, did not submit the matter to the court for its decision but rested on his affirmative and opening case;

"(2) That the court on the record could not have been fully advised as to the law and facts;

"(3) That by reason of the foregoing the court could not 'duly' make and enter its minute order sustaining the plea of the respondent.

"Dated: Dec 11th 1942

"BEN C. MULDARY
"DINKELSPIEL &
DINKELSPIEL
"Attys for John O. England, Trustee"

(See original of said order, handed up herewith as a part of this certificate and report.) [23]

DISCUSSION BY AND OPINION OF REFEREE

Although the petition for review contains a number of allegations far different from, and more comprehensive than, those set forth in the trustee's petition, which, with the order to show cause and the plea to the court's jurisdiction, was before the court on December 9, 1942, the date of the complained-of order, it is solely with the averments contained in the trustee's last mentioned petition and the attempted proof of said averments, particularly as regards possession of the license, that the court was called upon to deal when said order was made.

Boiled down to its essence, the vital proof which the trustee was bound to make in order to establish jurisdiction in the bankruptcy court, over the adverse claimant's, David Nyhan's objection, was that, at the time of the filing of the petition in bankruptcy, the license in controversy was in the actual or constructive possession of the bankrupt. As was said in Taubel-Scott-Kitzmiller Co., Inc. v. Fox, 264 U. S. 426, 432, 433 44 S. Ct. 396, 398, 399, 68 L. Ed. 770, 774, "Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was

thereafter wrongfully withdrawn from his custody; where the property is in hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, [24] but the claim is colorable* only."

What are the trustee's allegations as regards pos-

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*See In re Western Rope & Mfg. Co., (C.C.A. 8) 298 F. 926, [affirmed on certiorari, Harrison v. Chamberlin, 271 U.S. 191, 46 S. Ct. 467, 70 L. Ed. 897.], in which, at page 927, the Circuit Court said, as it will might be in the instant matter, "We think the Mueller Case and quite a few other cases before the various Courts of Appeals have established the doctrine that where the claim alleged to be adverse is not really so, but only colorably such, that the bankruptcy court has jurisdiction to determine the character of the claim in that respect and, if it is colorable only, to adjudicate the merits of the matter in a summary manner. The application of this rule involves a definition of what is meant by colorable. In our judgment, the meaning of that word as used in this connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant, there is, as matter of law, no adverseness in the claim.

"Measured by the above standard, we cannot say that this claim is merely colorable. . . . However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction, but is pertinent only on the merits in the court properly having jurisdiction of the controversy. For the purposes of determining whether this claim is merely colorable, we think we must take it that the above circumstances would be shown and might be found to be true. In that view of the matter, we cannot say as matter of law, that there is no merit to the claim."

session? They are found on page 2 of his petition, commencing with line 19 and ending on line 23, (pages 6 and 7 of this certificate and report). They read:

"That said Respondent David Nyhan and Respondent bankrupt herein have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or trustee for said Respondent bankrupt."

What, in effect, is the proof offered in support of said allegations? That, according to James Nyhan, the bankrupt, the sole witness called on behalf of the trustee in justification of the jurisdiction of this court, said witness had attempted to transfer the permits to his brother, David Nyhan, about a week after said brother had arrived here from the East, which, the witness believed, was in 1939 or 1940; that the witness had attempted to [25] transfer said permit five or six times because his brother has insisted on it. (Page 4 of Reporter's Transcript, page 15 of this certificate and report.)

The following question also was asked and the following answer also was given by said witness on direct*ion* examination:

"Q. These documents, including your permit, were returned to you by the Police Department, were they not?

"The Witness: A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to any-

one but the one the permits were in, James Nyhan. I was there, my brother was there. We both received it."

(Reporter's Transcript, page 9, page 20 of this certificate and report.)

Unquestionably, in the absence of any objection, or assertion of an adverse claim on the part of David Nyhan, the court legally would have been entitled to hold that the bankrupt's joint possession was sufficient, under the law, to enable the court to pass upon, in a summary proceeding, David Nyhan's interest, if any, in the permit, or license, in controversy. The court, however, could not overlook the statements made, under oath, by David Nyhan in his verified plea to the court's jurisdiction, i.e., "That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the [26] owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee's Petition.

"Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for Respondent, David Nyhan.

"Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said

taxi license at no time was and not now is a part of the assets of said bankrupt's estate."

(Page 3 of said verified plea, page 11 of this certificate and report.)

If it be assumed that ordinarily the joint possession of the bankrupt, even with an adverse claimant, would justify the court in proceeding summarily, that rule could not be applied herein, in the first instance, and in my opinion, cannot be applied by the District Court, sitting as an appellate tribunal, for the reason that David Nyhan, having set up his adverse claim to the effect that said bankrupt is said David Nyhan's agent, trustee or bailee, the court is bound by the rule that where one holds possession under the conditions claimed by David Nyhan, that the possession of the bankrupt is the possession of David Nyhan, and hence the court is without jurisdiction in a summary proceeding to deal with the adverse claimant's purported interest in the license in question.

See Sproul v. Levin, (C.C.A. 8) 88 F. (2d) 866.

But, so may run the argument of counsel seeking a review of the complained-of order, the District Court, in view of its order adjudicating James Nyhan a bankrupt, which is based on a finding to the effect that the said license was transferred from [27] said bankrupt to said David Nyhan in fraud of creditors, is bound to apply the rule of res ajudicata, so far as the title to said license

is concerned. Regardless of said finding, however, the last mentioned rule seemingly cannot be made applicable to the proceeding now under consideration for the all-important reason that this proceeding, so far as David Nyhan is concerned, does not deal with the rights and privileges of the bankrupt, but does deal with the rights and privileges of said brother, David Nyhan, who was not a party to the proceeding wherein James Nyhan was adjudged a bankrupt. "It is well settled," said the court in Lyon v. Perin Manufacturing Co., 125 U. S. 698, 700 8 S Ct. 1024, 1025, 31 L. Ed. 839, 840, 841, "that, in order to render a matter res ajudicata, there must be a concurrence of the four conditions, viz.: (1) Identity in the thing *sue* for; (2) Identity of cause of action; (3) Identity of persons and parties to the action; and (4) Identity of the quality in the persons for or against whom the claim is made." The last mentioned rule is followed strictly in this circuit. Schodde v. United States, (C.C.A. 9) 69 F. (2d) 866, 869, 870.

It further may be argued in contending that the petition for review should be granted, that inasmuch as the court, before entering the order adjudicating James Nyhan a bankrupt found a transfer of the license in question had been made to David Nyhan in fraud of creditors of said bankrupt, David Nyhan the adverse claimant cannot be heard to complain in a proceeding which, summarily without his consent, would deprive him of the right to have his claim determined in a

plenary proceeding. This, however, in my opinion, is not the law. According to my interpretation, ". . . a claim may be adverse and substantial, even though in fact fraudulent and voidable." Such is held In re Bastanchury Corporation, Ltd., (C.C.A. 9) 62 F. (2d) 537, 542. [28]

See, also, Mueller v. Nugent, 184 U. S. 1, 15, 22 S Ct. 269, 275, 46 L. Ed. 405, 412, and In re Yorkville Coal Co., (C.C.A. 2) 211 F. 619 622, in which, in the latter case, it is said, "Whether the facts are true or fraudulent or false or fictitious, it cannot be determined without the claimant's consent. It is the claimant's right to have the truth of the testimony and the merits of the claim determined, if he so prefers, in a plenary suit."

On behalf of the trustee, as shown by the notations at the bottom of the written order sustaining the plea to the jurisdiction, (page 2 of said order), complaint is made that because the trustee "did not submit the matter to the court for its decision but rested on his affirmative and opening case; . . . the court on the record could not have been fully advised as to the law and facts," and hence "could not 'duly' make and enter its minute order sustaining the plea of the respondent" (David Nyhan).

It is quite evident that what seemingly is overlooked in this contention is the vital factor that the court must decline jurisdiction as soon as the substantiality of the adverse claimant's claim is made to appear, and in this proceeding that sub-

stantiality appeared as soon as David Nyhan's verified plea to the jurisdiction was placed before the court, and the trustee had ceased to present further testimony to show the jurisdiction in this court, so far as was, and is, concerned the summary determination of the rights of David Nyhan.

See Benjamin v. Central Trust Co., (C.C.A. 7) 216 F. 887, 888, 889, wherein it is said, ". . . substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer, which is unmet by the trustee, or which, if met by replication, is supported by sworn testimony of facts which, if true, would show title and possession antedating the petition in bankruptcy." [29]

In connection with the complaint made on behalf of the trustee that the matter was not submitted for decision, it is to be noted that the denied request only was that counsel for said trustee be given an opportunity to submit authorities.

(Reporter's Transcript, page 9, page 20 of this certificate and report.)

No suggestion whatever was given that further evidence would be offered on the trustee's behalf. Unfortunately for the trustee, on the state of the record, had a request been made to present further testimony, under the rule existent in the Ninth Circuit, I legally would have been compelled to deny the request, because, at the time of the request to supply authorities even, I orally had made, and in writing had entered in my min-

ute book, the order sustaining the plea to the jurisdiction. Under the circumstances, the entry of such order was final, so far as my power as referee was, and is, concerned, i.e., I could not have changed the entered order had I felt inclined to do so.

See In re Lyders, (D.C., N.D., Calif.) 16 F. Supp. 213, 214, 215, [undisturbed on appeal in Lyders v. Petersen (C.C.A. 9) 88 F. (2d) 9], and In re Faerstein, (C.C.A. 9) 58 F. (2d) 942, the court in the latter case, at page 943, having declared, "When an order is entered, the referee's power over the order is ended. The remedy is exclusive and he may not review or change the order. In re Russell (D.C.) 105 F. 501; In re Wister & Co. (D.C.) 232 F. 898; also, In re Greek Mfg. Co. (D.C.) 164 F. 211; In re Marks (D.C.) 171 F. 281; In re Avoca Silk Co. (D.C.) 241 F. 607; Matter of J. W. Renshaw's Sons, Bankrupt (D.C.) 3 F. (2d) 75; Matter of Wm. L. David (C.C.A.) 33 F. (2d) 748; David v. Hubbard, 280 U. S. 514, 50 S. Ct. 19, 74 L. Ed. 585." [30]

Assuming, without expressing an opinion, either pro or contra as to such procedure, that even as against David Nyhan, claiming adversely to the bankrupt's estate, the court in the first instant might have looked, and the District Court, as an appellate tribunal, may look, to the record as to the bankrupt's title to said license, the question relative to the title thereto is not necessary to be considered in connection with the complained-of order, for the pertinent reason that where the court's jurisdiction to proceed summarily is in-

volved, ". . . the test of this jurisdiction is not title in but possession by the bankrupt at the time of the filing of the petition in bankruptcy," as was said in Thompson v. Magnolia Co., 309 U. S. 478, 481, 60 S. Ct. 628, 630, 84 L. Ed. 876, 880. Reverting to the proceeding of December 9, 1942, what had been proved on behalf of the trustee at the time the complained-of minute order was entered was either one of two things: (1) Positively, that at the time the petition to adjudged James Nyhan a bankrupt was filed, David Nyhan, and not the bankrupt, was in possession of the license, or (2) Negatively, that the license was not in the possession of the bankrupt at the time of the filing of the original petition in bankruptcy.

Such being the case, when the order which is sought to be reviewed was entered, from the mouth of the trustee's own witness had come the words that definitely and unqualifiedly showed that the court, upon the record presented, on December 9, 1942, was without jurisdiction to proceed against David Nyhan, regardless of its power over the bankrupt and his estate.

If, as the trustee claims, this license be a part of the bankrupt's estate, whose title thereto is good, even as against the claim of David Nyhan, the questioned order does nothing, except to say that the trustee must proceed against David Nyhan in a forum [31] in which the decisions of the higher federal courts have declared to be proper and, in this instance, the bankruptcy court, in my opinion, is not such a forum, as was, and is, evidenced by the order now sought to be reviewed.

PAPERS HANDED UP HEREWITH

The following papers are handed up herewith as a part of this certificate and report:

(1) Petition for Review of Referee's Order Sustaining Plea to Jurisdiction and Quashing Order to Show Cause;

(2) Trustee's Petition for Order Authorizing Sale of Personal Property and Temporary Restraining Order Thereon;

(3) Order to Show Cause;

(4) Verified Plea of Respondent David Nyhan Objecting to the Summary Jurisdiction of the Above Entitled Court and for an Order Quashing Service of Order to Show Cause Directed to Said Respondent as Issued by the Above Entitled Court;

(5) Reporter's Transcript of Hearing on Order to Show Cause Against David Nyhan, and

(6) Order Sustaining Plea to Jurisdiction and Quashing of Order to Show Cause.

Dated: January 28th, 1943.

Respectfully submitted,

BURTON J. WYMAN

Referee in Bankruptcy

[Endorsed]: Filed Jan. 28, 1943. [32]

[Title of District Court and Cause.]

TRUSTEE'S PETITION FOR ORDER AUTHORIZING SALE OF PERSONAL PROPERTY AND TEMPORARY RESTRAINING ORDER THEREON.

Comes now John O. England, and respectfully represents:

That on or about the 17th day of November, 1941, an involuntary petition in bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, against Respondent James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and that thereafter such proceedings were had that on or about the 11th day of June, 1942, said James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, was duly adjudged to be a bankrupt in accordance with the provision of the Acts of Congress relating to bankruptcy, and that thereafter and on or about the 20th day of August, 1942, your petitioner was [33] duly appointed as Trustee of said bankrupt's estate, and thereupon duly qualified as, and has since been and now is the duly appointed and acting Trustee of the estate of the above-named bankrupt.

That your petitioner is informed, believes, and therefore represents that on and before said 11th day of November, 1941, at the time said petition in bankruptcy was filed in said district as aforesaid, the above-named bankrupt was the owner of and

entitled to the possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, under and by virtue of the Ordinances of said City and County of San Francisco, authorizing and permitting said bankrupt to operate eight taxi cabs for hire on the streets of said City and County and State, naming James Nyhan, doing business as "California Cab Co." as licensee.

That your petitioner is informed, believes, and therefore represents, that Respondent David Nyhan, claims an interest in said above-described taxi license but that as a matter of fact, has no such interest in law or equity.

That said Respondent David Nyhan and Respondent bankrupt herein have joint possession and control of said above-described taxi license, and that Respondent David Nyhan now holds possession of said taxi license as agent and or trustee for said Respondent bankrupt.

That by reason of the premises your petitioner is informed, verily believes, and therefore represents, that the said personal property was, at all times herein mentioned and still is, a part of the assets of the estate of said bankrupt and subject to administration herein as part of said estate.

That your petitioner represents that unless this Honorable Court enter its temporary restraining order herein forbidding any [34] transfer or encumbrance of that certain personal property above-

described by the said Respondent, until this matter is finally determined by this Court, that said personal property will be forever lost to this bankrupt estate.

Wherefore, your petitioner prays for an Order authorizing and directing him as Trustee, to administer upon and to sell, in the manner prescribed by law, said above-described taxi license, as part of the assets of the estate of the bankrupt above-named free and clear of any property liens, claim, right, title, or interest of said Respondents; and that pending the hearing of this petition and until this matter is finally determined by this Court the Respondents, and each of them, be restrained from transferring or encumbering said personal property and for such other and further Order and or relief as may be meet and proper in the premises.

Dated: This 10th day of November, 1942.

JOHN O. ENGLAND
Trustee
DINKELSPIEL & DINKELSPIEL
Attorneys for Trustee [35]

United States of America
State of California
City and County of San Francisco—ss.

John O. England, being first duly sworn, deposes and says: that he is the Trustee in the foregoing Bankruptcy proceedings and the petitioner named in the foregoing petition; that he has read said petition and knows the contents thereof; that the same

is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true.

JOHN O. ENGLAND

Subscribed and sworn to before me this 10th day of November, 1942.

[Seal] LOUIS WIENER

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed with Referee Nov 10 1942.

[Endorsed]: Filed with Clerk Jan 28 1943. [36]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE.

Upon consideration of the annexed duly verified petition of John O. England, Trustee herein, for an Order authorizing the sale of personal property and good cause appearing therefor, now on motion of Messrs. Dinkelspiel & Dinkelspiel, Attorneys for said Trustee herein, it is hereby

Ordered, that James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan, and David Nyhan, and each of them, do personally be and appear before the undersigned Referee in Bankruptcy at the office of Burton J. Wyman, Room 604, Grant Building at San Francisco, California, in said District, at the hour of 2:00 o'clock P. M. on the 17th day of November, 1942, then and there to show cause, if any,

or each of them and why the prayer of said annexed Trustee's petition [37] should not be granted; and it is further

Ordered, pending the hearing of this Order to show cause and until further ordered of this Court, the Respondents and each of them, are hereby restrained from in any way selling, transferring, or encumbering the personal property described in said annexed petition; and it is further

Ordered, that service of this Order be made by delivering to said Respondents, and each of them, a duly certified copy of this Order, together with a true copy of said annexed Trustee's Petition, at least 2 days prior to the aforesaid hearing hereof.

Dated: This 10 day of November, 1942.

BURTON J. WYMAN
Referee in Bankruptcy

[Endorsed] Filed with Referee Nov 10 1942

[Endorsed] Filed with Clerk Jan 28 1943 [38]

[Title of District Court and Cause.]

VERIFIED PLEA OF RESPONDENT DAVID NYHAN OBJECTING TO THE SUMMARY JURISDICTION OF THE ABOVE ENTITLED COURT AND FOR AN ORDER QUASHING SERVICE OF ORDER TO SHOW CAUSE DIRECTED TO SAID RESPONDENT AS ISSUED BY THE ABOVE ENTITLED COURT

To the Honorable, the Judges of the United States District Court for the Northern District of California, and to Honorable Burton J. Wyman, Referee in Bankruptcy for said Court at San Francisco, California:

Now comes, David Nyhan, of the City and County of San Francisco, State and District aforesaid, Respondent to an order to show cause issued by the above entitled Court on the 11th day of November, 1942 and returnable on the 2nd day of December, 1942 and continued until December 9, 1942, and appearing specially and not otherwise for the purpose of objecting to the summary jurisdiction of the above entitled court and moving said court for an order quashing the service of said order to show cause, and for grounds of his plea objecting to the jurisdiction of the above entitled court alleges: [39]

1. That it affirmatively appears from the petition of the Trustee, John O. England, upon which said order to show cause was issued by the above entitled court, that the above entitled court was and is without jurisdiction to hear and determine the matters

therein stated or to make any order against the respondent therein named except by consent of this respondent, and that this respondent has never consented to submit himself to the jurisdiction of the above entitled court, but, on the contrary, this respondent has declined and does decline to submit himself to the jurisdiction of the above entitled court to hear and determine any of the matters set forth in said Trustee's petition or be subjected to any orders of the above entitled court pertaining to any of the matters set forth in said Trustee's petition.

2. That it affirmatively appears from the face of said Trustee's petition and the order to show cause issued by the above entitled court, that the facts stated in said Trustee's petition do not confer upon the above entitled court summary jurisdiction over said respondent without his consent.

3. That it affirmatively appears from said trustee's petition, upon which said order to show cause was issued, and from said order to show cause, that the issues which the Trustee seeks to submit to the above entitled court as grounds for the granting of the prayer of said petition can only be determined in a plenary action and not in a summary proceeding instituted by said Trustee herein, and it affirmatively appears from said petition that no summary jurisdiction can be exercised by the above entitled court as it relates to this respondent, without the consent of this respondent.

That this respondent is entitled to have said issue determined in a plenary action and to have a trial

by jury of the [40] issues raised in said petition pursuant to his demand.

For a further, separate and distinct objection to the summary jurisdiction of the above entitled court, this respondent alleges as follows, to-wit:

That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California and mentioned in the Trustee's Petition.

Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for respondent, David Nyhan.

Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is a part of the assets of said bankrupt's estate.

Respondent alleges that any order granting the prayer of the Trustee herein would be in excess of the jurisdiction of the above entitled Court.

Wherefore, Respondent prays that service of the Order to show cause issued by the above entitled Court may be ordered quashed on account of lack

of jurisdiction of the above entitled Court to have issued said order to show cause.

DAVID NYHAN
Respondent

(Duly Verified.) [41]

Receipt of a copy of the within Verified Plea of Respondent is hereby admitted this 5th day of December, 1942.

BEN O. MULDARY
DINKELSPIEL &
DINKELSPIEL
Attorneys for Trustee, John O. England

[Endorsed] Filed with Referee Dec 5 1942.

[Sndorsed] Filed with Clerk Jan 28 1943. [42]

[Title of District Court and Cause]

ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING OF ORDER TO SHOW CAUSE

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his Attorneys, and the Respondent appearing by his Attorney,

and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said plea of said Respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of Respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said Respondent be, and the same is hereby quashed.

Dated: the 9th day of December, 1942.
Signed Dec. 11, 1942.

BURTON J. WYMAN
Referee in Bankruptcy

[43]

APPROVAL OF ORDER AS TO FORM

Pursuant to Rule 22 of the above entitled Court the foregoing proposed order is not approved as to form.

Dated: Dec 11th 1942

BEN C. MULDARY
DINKELSPIEL & DINKELSPIEL
Attorneys for John O. England, Trustee

REASONS FOR NOT APPROVING THE FOREGOING PROPOSED ORDER:

(1) That Petitioner John O. England, Trustee, did not submit the matter to the court for its decision but rested on his affirmative and opening case;

(2) That the court on the record could not have been fully advised as to the law and facts;

(3) That by reason of the foregoing the court could not "duly" make and enter its minute order sustaining the plea of the respondent.

Dated: Dec 11th 1942

BEN C. MULDARY
DINKELSPIEL & DINKELSPIEL
Attorneys for John O. England, Trustee

[Endorsed]: Filed with Referee Dec 11 1942

[Endorsed]: Filed with Clerk Jan 28 1943 [44]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING ORDER TO SHOW CAUSE

To the Honorable Burton J. Wyman, Referee in Bankruptcy:

The petition of John O. England respectfully shows:

1. That your petitioner is the duly elected, qualified and acting Trustee of the above named bankrupt;

2. That heretofore and on the 10th day of November, 1942, your petitioner filed herein a verified petition for an order authorizing your petitioner to sell a certain taxi license or permit standing in the name of the above named bankrupt permitting the holder of said taxi license or permit to operate eight taxicabs in the City and County of San Francisco, State of California, free and clear of any claim of David Nyhan, [45] alias, and an order to show cause issued thereon and served on said David Nyhan, which order to show cause and petition was returnable before the above entitled court on the 2nd day of December, 1942, and was duly and regularly continued from said date for hearing to the 9th day of December, 1942, and that said respondent David Nyhan served and filed his answer objecting to the summary jurisdiction of the above entitled court and requesting an order quashing service of the order to show cause;

That thereupon a minute order was entered on the 9th day of December, 1942, sustaining the plea of the jurisdiction and quashing the order to show cause, and that thereafter, on the 11th day of December, 1942, an order was entered sustaining the plea to the jurisdiction and quashing the order to show cause, in words and figures as follows:

"In the District Court of the United States for the Northern District of California, Southern Division

No. 34467 R

In the Matter of James Nyhan, also known as James P. Nyhan, also known as James Paul Nyhan, also known as Dick Nyhan,

Bankrupt.

ORDER SUSTAINING PLEA TO JURISDICTION AND QUASHING OF ORDER TO SHOW CAUSE

The verified Petition of John O. England, the Trustee, for an Order to Show Cause directed to Respondent, David Nyhan, and the verified objection of said David Nyhan to the summary jurisdiction of the Court and praying for an order quashing service of the Order to Show Cause coming on regularly for hearing this 9th day of December, 1942, and the Trustee appearing by his attorneys, and the respondent appearing by his attorney, and the Trustee having offered oral and documentary evidence upon the plea to the jurisdiction of the court and thereupon having rested and thereby submitted to the court the said plea to jurisdiction for its decision, the court thereupon being fully advised, duly made its minute order sustaining said [46] plea of said respondent to the jurisdiction of the above entitled Court;

It Is Hereby Ordered that pursuant to the minute order heretofore made by the above entitled court, the plea of respondent, David Nyhan, objecting to the summary jurisdiction of the above entitled Court be, and the same is hereby sustained and service of the Order to Show Cause issued by the above entitled Court directed to said respondent be, and the same is hereby quashed.

Dated: the 11th day of December, 1942.

BURTON J. WYMAN

Referee in Bankruptcy"

That said order is erroneous for the following reasons:

That said order is contrary to the facts and law in that the uncontroverted evidence shows that prior to the filing of the petition in bankruptcy, which said petition was filed on November 17, 1941, said bankrupt attempted to assign and transfer said taxi license or permit to his brother David Nyhan, alias, said respondent; that under the provisions of the ordinances of the City and County of San Francisco, said license is transferable only with the consent of the Police Commission of said City and County, and that upon the 10th day of November, 1941, an application was made by respondent David Nyhan, alias, and said bankrupt pursuant to said municipal ordinance of the said City and County of San Francisco, to the Chief of Police and the Police Commission of said City and County for an order permitting said transfer and assign-

ment of said permit, and the certificate for said permit was filed with said Chief of Police of said City and County with said application;

That thereafter and subsequent to the filing of the [47] petition in bankruptcy said Chief of Police and Police Commission denied and refused to permit the transfer of said taxi permit and license and that the same was redelivered by said Chief of Police to said bankrupt and his receipt obtained therefor;

That thereafter an appeal was taken by said David Nyhan, alias, said respondent and said bankrupt to the Board of Permit Appeals of the City and County of San Francisco, which said board thereafter sustained said ruling denying the transfer of said permit;

That the Referee's order on the foregoing facts denying jurisdiction for the summary order requested by the trustee to sell free and clear of any claim of David Nyhan, alias, said respondent, is contrary to the law in that said taxi permit or license at the time of the filing of the petition in bankruptcy was in the possession of the bankrupt and was an asset of the estate and therefore subject to the summary jurisdiction of the Referee;

That the order of the Referee sustaining the objections to the summary jurisdiction of the Referee, cannot be sustained in law on the evidence adduced.

Wherefore, your petitioner prays for a review of the said order by the Judge of this Honorable Court, and that said order be vacated and set aside,

and that the Referee be directed to enter an order denying the plea of the respondent to the jurisdiction of the Referee, and to decide the controversy on its merits and in accordance with the facts and law.

B. H. MULDARY
DINKELSPIEL & DINKELSPIEL
Attorneys for Trustee.
JOHN O. ENGLAND
Petitioner. [48]

(Duly Verified.)

[Endorsed]: Filed with Referee Dec. 17, 1942.

[Endorsed]: Filed with Clerk Jan. 28, 1943. [49]

In the Southern Division of the United States District Court of the Northern District of California

No. 34467-R

In the Matter of

JAMES NYHAN, also known as JAMES P. NYHAN, also known as JAMES PAUL NYHAN, also known as DICK NYHAN,
Bankrupt.

IN BANKRUPTCY

ORDER AFFIRMING REFEREE'S ORDER

The petition of John O. England, Trustee, for review of the Referee's Order entered in the above

matter on December 11, 1942, wherein the Respondent, David Nyhan's plea to the jurisdiction of the court was sustained and service of the order to show cause directed to said respondent was quashed, having been heretofore heard and submitted and the same being now fully considered it is by the Court Ordered that the aforesaid Order of the Referee be and the same is hereby Affirmed.

Dated: March 15, 1943.

MICHAEL J. ROCHE
United States District Judge

[Endorsed]: Filed Mar. 15, 1943. [50]

[Title of District Court and Cause.]

No. 34467-R

IN BANKRUPTCY

NOTICE OF APPEAL

Notice Is Hereby Given, that John O. England, trustee in bankruptcy of James Nyhan, bankrupt above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order made and entered by the Honorable Michael J. Roche, Judge of the United States District Court for the Northern District of California, Southern Division, on the 15th day of March, 1943, affirming the order and decision of the Honorable Burton J. Wyman, one of the Referees in Bankruptcy of said court, made and entered on the 11th day of Decem-

ber, 1943, sustained the objection of David Nyhan, respondent therein, to the summary jurisdiction of the United States District Court for the Northern District of California, Southern [51] Division thereof, and quashing service of the order to show cause theretofore served upon the said David Nyhan, upon the petition of John O. England, said trustee in bankruptcy, for an order of sale of certain taxi permits or licenses, free and clear of any lien of David Nyhan, said respondent.

Dated April 2nd, 1943.

DINKELSPIEL & DINKELSPIEL
B. H. MULDARY
Attorneys for Appellant John O. England, Trustee in Bankruptcy

[Endorsed]: Filed Apr. 2, 1943. [52]

[Title of District Court and Cause.]

NOTICE OF FILING DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE RELIED ON UPON APPEAL

To David Nyhan, and to Bernard Nugent, Esq., his attorney, 550 Montgomery Street, San Francisco, California, and to James Nyhan, Bankrupt, and to Ernest J. Torregano, Esq., his attorney, Mills Building, San Francisco, California.

You and Each of You Will Please Take Notice, that on 2nd day April, 1943, the undersigned Attorneys for Appellant in the above entitled proceedings filed with the Clerk of the United States District Court for the Northern District of California, Southern Division, their designation of portions of the record, proceedings and evidence and statement of points to be relied upon on appeal under Rule 75, a [56] copy of which is annexed hereto and served herewith.

DINKELSPIEL & DINKELSPIEL
B. H. MULDARY
Attorneys for Appellant John O. England, Trustee in Bankruptcy

Receipt of the foregoing Notice and service of a copy of the accompanying Designation of portions of record, and statement of points to be relied upon on appeal under Rule 75, and Notice of Appeal is hereby acknowledged this 3rd day of April, 1943.

BERNARD NUGENT
Attorney for David Nyhan
TORREGANO & STARK
ERNET J. TORREGANO
Attorneys for James Nyhan, said bankrupt.

[Endorsed]: Filed Apr. 6, 1943. [57]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD AND STATEMENTS OF POINTS TO BE RELIED UPON ON APPEAL UNDER RULE 75

Comes now John O. England, trustee in bankruptcy of James Nyhan, alias, appellant herein, and hereby designates as the part of the record which he deems necessary for the consideration of such appeal, the following:

1. The certificate and report of the Referee on petition for review of the Referee's Order sustaining plea to jurisdiction and quashing order to show cause, which certificate and report of the Referee includes the following:

(a) The petition of John O. England for an order to show cause why he should not sell certain taxi licenses or permits free and clear of any lien or claim of David Nyhan, respondent therein, filed November 10, 1942; [53]

(b) The order to show cause issued thereon, dated November 10, 1942;

(c) The answer of respondent David Nyhan denying summary jurisdiction in the United States District Court dated December 5, 1942;

(d) The transcript of testimony taken before the Honorable Burton J. Wyman, said Referee in Bankruptcy, with exhibits appended thereto, including the application to transfer license from James Nyhan, said bankrupt, to David Nyhan, the license from the Chief of

Police of the City and County of San Francisco to James Nyhan, and the denial of the application to transfer said license, Police Code, Section 1079, of the City and County of San Francisco, State of California.

(e) The Referee's Order sustaining the plea of the respondent, David Nyhan, to the summary jurisdiction of the United States District Court and quashing the order to show cause theretofore issued.

(f) The petition for review of John O. England, trustee in bankruptcy of James Nyhan, alias, dated Dec. 17, 1942.

(g) Discussion by and opinion of Referee.

2. The order affirming the decision and order of the Honorable Burton J. Wyman, made and entered by the Honorable Michael J. Roche, Judge of the United States District Court of Appeals on the 15th day of March, 1943, being the order appealed from.

3. Notice of Appeal.

4. This designation and notice of filing thereof.

5. Statement of points and notice of filing same.

STATEMENT OF POINTS TO BE RELIED UPON UNDER RULE 75, SUBSECTION (d).

That the order of the District Judge appealed from affirming the Referee's order denying jurisdiction for the summary order requested by the Trustee is:

1. Contrary to law;

2. Not sustainable under the facts presented;

That the order of the United States District Court [54] affirming the order of the Referee sustaining objections to the summary jurisdiction, is in error on the law and the facts.

Dated April 2nd, 1943.

DINKELSPIEL & DINKELSPIEL
B. H. MULDARY
Attorneys for Appellant

[Endorsed]: Filed Apr. 2, 1943. [55]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 57, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of James Nyhan, etc., Bankrupt, No. 34467 R, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Eight 55/100 Dollars and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of May, A. D. 1943.

[Seal] WALTER B. MALING
Clerk
E. H. NORMAN
Deputy Clerk

[Endorsed]: No. 10424. United States Circuit Court of Appeals for the Ninth Circuit. John O. England, Trustee of the Estate of James Nyhan, Bankrupt, Appellant, vs. David Nyhan, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 6, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10424

In the Matter of

JAMES NYHAN, also known as JAMES P. NYHAN, also known as JAMES PAUL NYHAN, also known as DICK NYHAN,
Bankrupt.

CONCISE STATEMENT OF POINTS TO BE RELIED UPON BY APPELLANTS ON APPEAL UNDER RULE 19 (6)

Comes now John O. England, Trustee in Bankruptcy of James Nyhan, alias, appellant herein, and specifies the following as a concise statement of points on which he intends to rely on his appeal herein.

That the order of the District Court appealed from affirming the Referee's order sustaining respondent David Nyhan's plea to the summary jurisdiction of the bankruptcy court and quashing the order to show cause, was and is erroneous, contrary to law, and not sustainable under the facts presented, in that:

(a) The District Court held that where a municipal ordinance provided that no taxi permit could be transferred or assigned by the owner and holder thereof without an application to the Chief of Police, and the granting of a permit for such transfer by the Chief of Police, and where the Chief of

Police had denied, prior to bankruptcy, an attempted transfer and assignment of such license from the bankrupt to the respondent David Nyhan, that such alleged transferee had a sufficient claim to the license or permit to defeat the summary jurisdiction of the District Court and to refuse an order of sale of said license or permit to the trustee in bankruptcy free and clear of the lien or claim of said transferee.

(b) The District Court held that the attempted transfer and assignment of the taxi license or permit by the bankrupt to David Nyhan, notwithstanding the provisions of the ordinance of the City and County of San Francisco requiring the consent of the Chief of Police to such transfer, which consent was denied, created an equitable claim or lien in the transferee sufficient to defeat the summary jurisdiction of the District Court.

(c) The District Court refused to take summary jurisdiction to make an order of sale free of the claim of David Nyhan, respondent and appellee herein, where the application to transfer the license had been denied by the Chief of Police, and at the date of the bankruptcy the license still stood in the name of the bankrupt.

(d) The District Court held that the paper evidencing the license or permit was in the possession of the transferee at the time of the filing of the petition in bankruptcy, and disregarded the fact that the license or permit is an inchoate right and that the paper on which the license was printed was valueless to the transferee, David Nyhan, re-

spondent and appellee herein, and gave him no rights therein without the consent to transfer of the Chief of Police.

(e) The Referee and the District Court erred in failing to find and decide that the court had summary jurisdiction of the property in question, to-wit, the taxicab license or permit, and of David Nyhan's claim thereto for the reason that all rights and privileges incident to said license or permit remained in the bankrupt at the date of adjudication and that the attempted transfer thereof or of the certificate evidencing the same to David Nyhan prior to bankruptcy was of no effect as the required consent of the Police Commission of the City and County of San Francisco to such transfer had not been obtained or was denied at the time of said adjudication.

Dated at San Francisco, California, this 13th day of May, 1943.

Respectfully submitted,
B. H. MULDARY,
DINKELSPIEL & DINKELSPIEL
By MARTIN J. DINKELSPIEL
Attorneys for Appellant

Received a copy of the foregoing Designation of Parts of Record Necessary for the Consideration of Appeal Under Rule 19 (6), and Concise Statement of Points To Be Relied Upon By Appellants

on Appeal Under Rule 19 (6) this 13th day of May, 1943.

BERNARD NUGENT
Attorneys for Appellees

[Endorsed]: Filed May 13, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION OF APPEAL UNDER RULE 19(6)

Comes now John O. England, Trustee in Bankruptcy of James Nyhan, alias, appellant herein, and hereby designates as the parts of the record which he thinks necessary for the consideration of such appeal, the entire record as contained in the transcript of said record on appeal heretofore transmitted to the Clerk of the above-entitled court by the Clerk of the United States District Court for the Northern District of California, Southern Division.

Dated at San Francisco, California, this 13th day of May, 1943.

Respectfully submitted,
B. H. MULDARY,
DINKELSPIEL & DINKELSPIEL
By MARTIN J. DINKELSPIEL
Attorneys for Appellants

[Endorsed]: Filed May 13, 1943. Paul P. O'Brien, Clerk.

No. 10,424

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of John Nyhan, Bankrupt,
Appellant,

vs.

DAVID NYHAN,
Appellee.

BRIEF FOR APPELLANT.

DINKELSPIEL & DINKELSPIEL,
333 Montgomery Street, San Francisco,
B. H. MULDARY,
Russ Building, San Francisco,
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Miscellaneous

No. 10,424

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of John Nyhan, Bankrupt,

Appellant,

vs.

DAVID NYHAN,

Appellee.

BRIEF FOR APPELLANT.

I. JURISDICTION.

This is an appeal by the appellant, John O. England, trustee of the estate of James Nyhan, a bankrupt, from an order of the United States District Court for the Northern District of California, Southern Division, affirming upon review an order of the Honorable Burton J. Wyman, Referee in Bankruptcy (Tr. ff. 49-50) which order sustained the plea of the appellee, David Nyhan, to the summary jurisdiction of the Bankruptcy Court (Tr. ff. 38-41) on appellant trustee's petition (Tr. ff. 32-35) for an order permitting the sale free and clear of any claim of the appellee of a license or permit to operate eight taxicabs on the streets of the City and County of San Francisco.

The District Court had summary jurisdiction of the case under section 2a, subsection 15, of the Bankruptcy Act, as will be discussed hereafter.

The appeal is taken under section 24 of the Bankruptcy Act.

II. STATEMENT OF THE CASE.

A. The appeal.

Appellant's petition alleged that appellee had no interest in the taxicab license or permit above referred to, and held that license as agent and trustee for the bankrupt. (Tr. ff. 33.)

Concisely, the issue is this. At the date the petition for this order was filed, the appellee held the bare certificate evidencing this permit or license. Prior to the date the petition was filed the Police Department of the City and County of San Francisco had not given its necessary consent to the transfer of this license to appellee and on that day, indeed, denied it, so that it remained of record in the name of the bankrupt. On that date the certificate was in the possession of the Police Department.

The Referee determined that appellee had such "possession" of this permit or license as to deprive the bankruptcy court of summary jurisdiction to order its sale and sustained the appellee's plea to the jurisdiction of the court on this sole ground. (Tr. ff. 42 and 30.)

The sole issue, therefore, is whether the appellee had such possession as to deprive the court of the as-

serted summary jurisdiction. Appellant proposes to show that under the facts the learned Referee erred in deciding in the affirmative.

B. The evidence.

James Nyhan, the bankrupt, was the owner of a permit standing in his name, issued by the San Francisco Police Department, authorizing him to operate eight taxicabs. (Tr. f. 20.) Section 1079 of the San Francisco Police Code provides as to the transferability of such permits:

> "All such permits or licenses granted hereunder shall be transferable only on consent of the Police Commission after written application shall have first been made to said commission and upon payment of the fee received of the new applicants." (Tr. f. 12.)*

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*Section 1079 of the San Francisco Police Code (Tr. f. 12) reads as follows:

> "Continuous Operation—Revocation Provided For. All persons, firms, or corporations within the purview of Sections 1075 to 1081 inclusive, of this Article shall regularly and daily operate his or its licensed motor vehicle for hire business during each day of the license year to the extent reasonably necessary to meet the public demand for such motor vehicle for hire service. Upon abandonment of such business for a period of ten (10) consecutive days by an owner or operator, the Police Commission shall, after five (5) days' written notice to the said owner or operator, direct the Police Department of the City and County of San Francisco to revoke said owner's or operator's licenses or permits, and said licenses or permits shall forthwith be revoked. All such permits or licenses granted hereunder shall be transferable only upon the consent of the Police Commission after written application shall have first been made to said Commission and upon payment of the fee required of the new applicants. Any and all such certificates of public necessity and convenience, permits and licenses and all rights herein granted may be rescinded and ordered revoked by the Police Commission for cause."

November 10, 1941, the bankrupt sought to transfer his permit to appellee, his brother. In this behalf he and his brother went to the Police Department where the bankrupt endorsed his name on the back of the permit and filed it with the Police Department while his brother signed and filed his application for the issuance of the license on the transfer to him when the necessary approval of the Police Commission should be given. (Tr. ff. 13-17.)

On November 17, 1941, the involuntary petition in bankruptcy was filed. (Tr. f. 32.) On the same date the Police Commission refused permission to transfer the permit. (Tr. f. 17.) On December 2, 1941, the Board of Permit Appeals of the City and County of San Francisco concurred in that decision. (Tr. f. 17.)

On December 2, 1941, James Nyhan and David Nyhan together went to the Police Department to get the document evidencing the permit. The Department indicated that it would surrender the document only to James Nyhan as he was the one in whose name it stood. James Nyhan signed a receipt, gave it to the police officer at the Bureau of Permits, and the permit was thereupon delivered and received. James Nyhan testified: "I was there, my brother was there, we both received it." (Tr. ff. 17-19.)

After adjudication the trustee, John O. England, obtained an order to show cause (Tr. f. 36) directed to David Nyhan to show cause why the trustee's petition (Tr. ff. 32-36) for an order authorizing the sale of the permits free from any claim of David Nyhan should not be granted. David Nyhan filed his answer

containing a plea to the summary jurisdiction of the Bankruptcy Court and requesting an order quashing service of the order to show cause. (Tr. ff. 38-42.) Upon the hearing the Referee sustained the plea to the jurisdiction and quashed the service of the order to show cause (Tr. ff. 42-43.) Upon review the United States District Judge (Tr. ff. 44 et seq.) affirmed the order of the Referee. (Tr. f. 49.) From these orders and decisions this appeal was taken.

III. SPECIFICATIONS OF ERROR.

The Referee's order and the Order of the District Court affirming the same were and are and each of them is erroneous, contrary to law and not sustained by the facts in that the Bankruptcy Court had summary jurisdiction of the property in question, to-wit, the taxicab license and permit and all rights and privileges incident to said license and permit for the reason that the undisputed evidence shows that said license and permit was at the time the involuntary petition herein was filed, to-wit, November 17, 1941, owned by and in the possession of the bankrupt and that the attempted transfer thereof by the bankrupt to appellee was void and of no effect lacking the consent of the Police Commission of the City and County of San Francisco as required by ordinances of said city and county; and furthermore, for the second and separate reason that the claim to said property made by appellee was and is no adverse claim but merely colorable.

IV. ARGUMENT.

A. THE NATURE AND LIMITS OF SUMMARY JURISDICTION.

By virtue of subsection 15 of Section 2a of the Bankruptcy Act, the Bankruptcy Court has power to "make such orders, issue such process and enter such judgments in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act."

This broad authority, broad enough indeed to cover this case, is restricted only by the provisions of Section 23, which requires plenary as opposed to summary action against "adverse claimants".

We agree with the learned Referee that under *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426, 432, 433, 44 Sup. Ct. 396, 398, 399, 68 L. Ed. 770, 775, summary jurisdiction requires possession, actual or constructive, of the property involved to be in the bankrupt at the time the petition is filed. In defining the necessary possession the court said:

> "The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only".

The *Taubel-Scott-Kitzmiller* case, supra, deals with physical tangible personal property where a definite distinction can be made between actual and constructive possession. In the present case, a license or permit to operate taxicabs for hire in the City and County of San Francisco is the subject matter of litigation. Such license is distinguishable from ordinary personal property in that it is an incorporeal right which is incapable of being physically possessed, so that the inquiry must be directed to the question whether it was constructively possessed by the bankrupt at the time of the filing of the petition in bankruptcy.

The first question to be discussed is, therefore, whether at the time of the filing of the petition the bankrupt had possession of the taxicab license.

Irrespective of possession, the bankruptcy court had summary jurisdiction because appellee's claim is not a substantial adverse claim but merely a colorable claim.

When jurisdiction is the sole issue, on appeal the allegations of the petition or complaint are determinative of the facts. See *Flanders v. Coleman,* 250 U. S. 223, 227; 39 Sup. Ct. 472; 63 L. Ed. 948; 43 A. B. R. 563; and *Matter of 671 Prospect Avenue Holding Corp.* (C. C. A. 2nd) 118 Fed. (2d) 453, 45 Am. B. R. (N. S.) 253, 255, where it was said:

> "It is conceded that the question of jurisdiction must be determined upon the allegations of the petition, which for present purposes are deemed to be true."

B. DID THE BANKRUPT HAVE POSSESSION OF THE TAXICAB LICENSE AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY?

(a) THE TERM 'POSSESSION'' AS APPLIED TO AN INCORPOREAL RIGHT IS A FIGURATIVE EXPRESSION, SINCE INCORPOREAL RIGHTS ARE INCAPABLE OF MANUAL POSSESSION. HOWEVER, THE TERM ''POSSESSION'' HAS BEEN CONSTANTLY APPLIED BY THE COURTS IN CONNECTION WITH THE DETERMINATION OF SUMMARY JURISDICTION OVER INCORPOREAL RIGHTS.

In the case of *In the Matter of Worrall,* 79 Fed. (2d) 88; 29 A. B. R. (N. S.) 604, 607, in connection with summary proceedings concerning a seat on the New York Stock Exchange, the court said:

> ''We have several times adverted to the fact that 'Possession' is a term hardly descriptive of control over a chose in action; yet, though borrowed from the field of tangible property, it has been constantly applied to intangibles. In re Hudson River Nav. Corporation (C. C. A., 2d. Cir.), 20 Am. B. R. (N. S.) 528, 57 F. (2d) 175; In re Borok (C. C. A., 2d. Cir.), 18 Am. B. R. (N. S. 270, 50 F. (2d) 75; and In re Roman (C. C. A., 2d. Cir.), 11 Am. B. R. (N. S.) 354, 23 F. (2d) 556. See, also, In re Kelley (D. C., N. Y.), 2 Am. B. R. (N. S.) 721, 297 F. 676, and In re I. Greenbaum & Sons (D. C., N. Y.), 24 Am. B. R. (N. S.) 301, 6 F. Supp. 245. The decisions are numerous that, if the bankrupt remained the legal owner of the chose in action up to the time of the filing of the petition, though it had become subjected to equitable liens or interests or attachments, his control was such that a trustee in bankruptcy who succeeded him was to be regarded as in 'possession' of the chose in action and as in a position summarily to determine his

rights as against other claimants. Board of Trade of City of Chicago v. Johnson, 264 U. S. 1, 2 Am. B. R. (N. S.) 528, 44 S. Ct. 232, 68 L. Ed. 533; In re Zimmerman (C. C. A., 2d. Cir.), 23 Am. B. R. (N. S.) 570, 66 F. (2d) 397; Street v. Pacific Indemnity Co. (C. C. A., 9th Cir.), 22 Am. B. R. (N. S.) 170, 61 F. (2d) 106, 108; In re Borok (C. C. A., 2d. Cir.), 18 Am. B. R. (N. S.) 270, 50 F. (2d) 75; Seattle Curb Exchange v. Knight (C. C. A., 9th Cir.), 17 Am. B. R. (N. S.) 469, 46 F. (2d) 34; In re Hoey (C. C. A., 2d. Cir.), 1 Am. B. R. (N. S.) 107, 290 F. 116; Orinoco Iron Co. v. Metzel (C. C. A., 6th Cir.), 36 Am. B. R. 247, 230 F. 40; In re: Ranford (C. C. A., 6th Cir.), 28 Am. B. R. 78, 194 F. 658; O'Dell v. Boyden (C. C. A., 6th Cir.), 17 Am. B. R. 751, 150 F. 731".

Among the decisions cited in the *Worrall* case, are two decisions of this Circuit. In the first of those cases, *Street v. Pacific Indemnity Co.,* 61 Fed. (2d) 106; 22 A. B. R. (N. S.) 170, the question before the court was whether book accounts which the bankrupt had assigned to a third party, were in the constructive possession of the bankruptcy court and subject to its summary jurisdiction. It was held that the assignment of book accounts was not fully completed because the debtors were not notified of the assignment and this left the assignor in the constructive possession of the book accounts at the time of the filing of the petition.

The other case referring to possession of incorporeal rights decided by this circuit, is the case of *Seattle Curb Exchange v. Knight,* 46 Fed. (2d) 34;

17 A. B. R. (N. S.) 469. There, the question was whether the right to the proceeds of a sale of a seat on the Seattle Curb Exchange as between the trustee in bankruptcy and the Seattle Curb Exchange, could be litigated in summary proceedings in the Bankruptcy Court.

The bankrupt had been a member of the Seattle Curb Exchange. Shortly prior to the filing of the voluntary petition in bankruptcy, and for a valuable consideration, he had sold his membership to a certain Phippeny, endorsing his name upon the certificate of membership in said exchange, as well as making a written assignment of his membership to Phippeny. The question was whether in spite of such attempted transfer of the seat, the same came into the custody of the bankruptcy court at the time of the filing of the petition in bankruptcy because the stock exchange had not consented to the transfer prior to bankruptcy. The court held that the seat was in the possession of the bankrupt, and hence had come into the custody of the bankruptcy court at the time of the filing of the petition. In deciding the question, the court cited, with approval, from *O'Dell v. Boyden* (C. C. A., 6th) 150 Fed. 731, 737, 17 A. B. R. 751, as follows:

> "The 'seat' or 'membership' continued to be the 'seat' of Henrotin, and was a pecuniary asset which passed to his trustee. It was as much in his custody and possession as such a species of property is capable of. To deny the trustee's possession would be to deny the capability of possession of a chose in action or other incorporeal right or equity. The possession may be constructive, and not manual; but it is only so because such prop-

erty is not capable of a more tangible custody. Only through a court of equity can the pecuniary value of such an asset be realized to creditors or assignees. Only by decree in personam compelling the bankrupt member can such a transfer of membership be effectuated as will put the buyer in the place of Henrotin as a member. Over him for that purpose the bankrupt court has exclusive control, and in this sense, also, may it be said that the 'seat' or 'membership' was in custodia legis when the trustee sought the aid of the court to adjudicate the claim and liens asserted by O'Dell."

Reference is also made to the case of *Board of Trade v. Johnson,* 264 U. S. 1, 68 L. Ed. 533, 2 A. B. R. (N. S.) 528, which was also a stock exchange case, where the court held that the membership in a stock exchange as an incorporeal right passes to the trustee of the bankrupt, and then recognizes that such right is incapable of manual possession. The court said at page 12:

"The petitioners argue that a seat on the exchange, even if it be property, is incapable of manual possession, that it is really only a chose in action, and that the bankrupt or his trustee is no more in actual possession of it for the purposes of summary jurisdiction than the trustee would be in manual possession of a debt, to enforce the payment of which the trustee must certainly bring a plenary action against the resisting debtor. Membership on the Board of Trade is different from a mere chose in action, like a simple claim or debt asserted against another, and only to be enjoyed after its satisfaction or enforcement. It is a continuously enjoyed 'incor-

poreal right'. Hyde v. Woods, supra. The Board of Trade is the member's trustee, while it maintains and holds all its facilities for his use and enjoyment. As long as he has these, he may properly be said to be in possession of them. That creditor members may assert a mere restraint of alienation to enforce their claims does not oust the member's possession or personal enjoyment. By operation of the bankruptcy law the membership passes, subject to rules of the exchange, to the trustee for his disposition of it. The trustee does not become a member, but he does come into control of the bankrupt's right to dispose of the membership, and with the aid of the bankruptcy court can require the bankrupt to do everything on his part necessary under the rules of the board to exercise this right. The membership is property in a way attached to the person of the bankrupt and disposable only by his will. It follows him, therefore, into the bankruptcy court, which is given full equitable jurisdiction over his conduct in respect of his estate, and therefore comes into the custody of that court to be administered by it as a part of his estate."

In the case of *In the Matter of Irvin Wechsler,* 27 Fed. Supp. 301, 39 A. B. R. (N. S.) 214, the court was concerned with a liquor license which the bankrupt alleged to have assigned prior to the filing of the petition in bankruptcy. The court affirming the summary jurisdiction said:

"In the case of a license with the characteristics of property, there is summary jurisdiction to determine title if the debtor was in possession of the usual rights or privileges covered by the li-

cense when the bankruptcy proceeding was commenced, see Chicago Board of Trade v. Johnson, 264 U. S. 1, 2 Am. B. R. (N. S.) 528, or if an alleged adverse claimant has a title or lien that is only colorable."

See also:

Fisher v. Cushman (C. C. A. 1st), 103 Fed. 860.

From the foregoing authorities, it is clear that possession by the bankrupt of incorporeal property such as a license or permit, has been recognized as the foundation of summary jurisdiction.

We, therefore, will discuss what the courts have held to be possession in the case of such incorporeal rights.

(b) WAS THE BANKRUPT IN "POSSESSION" OF THE INCORPOREAL RIGHT AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY?

Under Section 1079 of the San Francisco Police Code, the consent of the Police Commission is a prerequisite to the transfer of a taxicab license, and the attempted transfer by the bankrupt to the appellee, his brother, was denied on the day of the filing of the petition.

It appears from the above facts that at the time of the filing of the petition no valid transfer of the taxicab license had taken place since the consent of the Police Commission, which is necessary to validate the transfer of a license, had not been obtained.

It follows that whatever dealings had taken place between the bankrupt and the appellee as to the taxi-

cab business, no valid transfer of the license and of the business was made, because under the California law all agreements concerning the transfer of such a license are invalid if made without the approval of the licensing authority and such invalidity affects also transactions concerning the business for the operation of which a license is required.

In *Teachout v. Bogy,* 175 Cal. 481, 485, it was held:

> "A permit of this character is issued in the exercise of the police power as a means of regulating the business of selling intoxicating liquors. Such permit is personal to the licensee, and it authorizes him alone to carry on the business. There was no law authorizing a transfer of the permit. Hence, a transfer of the paper issued as evidence of the permit did not carry to the transferees the right to conduct the business, nor exempt them from the prohibition forbidding any person to engage in the business without a permit. In so doing they would be guilty of a violation of the law to the same extent as if they had no permit. (Black on Intoxicating Liquors, Sec. 130; 23 Cyc. 154; 17 Am. & Eng. Ency. of Law, 232.) The contract was therefore an agreement whereby the defendants were to carry on the saloon business in violation of express law."

See also 16 Cal. Jur. 190 where it is said:

> "Thus a transfer of the paper issued as evidence of the permit to engage in a certain business in a city does not give the transferee the right to conduct the business nor exempt him from the prohibition of the city charter forbidding any person to engage in the business without a permit. Moreover, a contract for the sale of a business

> and of the license issued to the vendor, and for the subsequent carrying on of the business by the vendee without any other license, is an agreement whereby the vendee is to carry on the business in violation of express law. And the vendor's promise to pay a single consideration for the transfer of such a business and license is void. * * *''

Thus, all agreements to the effect that the license was to be transferred to the appellee, are void and invalid under the local law, and the ownership of the incorporeal right remained in the bankrupt.

In the case of incorporeal rights the courts do not distinguish between possession and legal ownership as in the case of personal property. *So long as the legal ownership has not been validly transferred the bankrupt is still in possession of the incorporeal right.*

This was squarely held in the case of *In the Matter of Worrall,* supra, at page 608, where the court expressed the rule as follows:

> "The decisions are numerous that if the bankrupt *remained the legal owner of the chose in action up to the time of the filing of the petition, though it had become subjected to equitable liens or interests or attachments,* his control was such that a trustee in bankruptcy who succeeded him was to be regarded as 'in possession of the chose in action summarily to determine his rights as against other claimants'." (Italics ours.)

In the case of *Matter of Marsters* (C. C. A., 7th) 101 Fed. (2d) 365, 39 A. B. R. (N. S.) 103, the court

answered the question of what is constructive possession in the case of an intangible, as follows:

> "The term 'constructive', as applied to the possession of an intangible, is not used to distinguish such possession from some other kind of possession of an intangible. In the case of a tangible there can be a possession in fact as well as in legal theory; but in the case of an intangible, possession is a legal concept and is manifested only through recognition of legal consequences. It may be said that ownership of intangibles is the subject of possession, or that ownership draws to itself a constructive possession, *but such statements merely afford a rational basis for the practical rule that the legal consequences of possession of a tangible res are attached to the ownership of an intangible res. One of the legal consequences of a bankrupt's possession of a tangible asset is that his trustee succeeds to the possession, and the bankruptcy court thereby acquiring possession, has summary jurisdiction to adjudicate adverse claims respecting the asset.*" (Italics ours.)

In the case of *Hart v. Seacoast Credit Corporation* (Crt. Chan. N. J.) 115 N. J. Eq. 28, 169 A. 648, which case is similar to the instant case in that the sale of a bus franchise was, under the local law, subject to approval by the Board of Public Utility Commission, the court said:

> "That prior to approval by the commissioners the purchaser has no title, legal or equitable, in the franchise, even though he had paid the purchase price and the seller has executed and delivered documents of title. The purchaser has only the right to apply for approval. If and when ap-

proval is granted title then vests without further action of the parties."

See, also, the recent case of *Matter of Lissak,* 110 Fed. (2d) 370, 42 A. B. R. (N. S.) 237, at page 239, where the court, citing *In re Worrall,* supra, said:

> "The bankrupt still remained the legal owner of the chose in action represented by the policy of insurance and, though it had been subjected to equitable liens, he was still to be deemed in such 'possession' of it, that the bankruptcy court might in a summary way determine the respective rights of the bankrupt and adverse claimants."

Hence, notwithstanding the existence of equities in others, the constructive possession continues to be in the bankrupt so long as the bankrupt remains the legal owner of the right in question.

In the instant case the bankrupt, at the time of the filing of the bankruptcy petition, was indisputably the legal owner of the incorporeal right, and therefore he had constructive possession.

(c) THE POSSESSION OF THE CERTIFICATE FOR THE PERMIT IS IMMATERIAL.

The transfer of the license could not be validly made without the consent of the Police Commission of the City and County of San Francisco. Hence a transfer of the paper issued as evidence of the permit did not carry the right to conduct the business.

See:

Teachout v. Bogy, supra, at page 485.

In a case where no consent of a third party or of an administrative body is needed for the transfer of a right or chose in action, the endorsement of a paper, evidencing such right, is considered as symbolic delivery of the right and as the act which makes the transfer of the right effective. However, in the case of a license which can be transferred only upon the consent of an administrative body, such endorsement of the paper evidencing the license and its delivery can be regarded only as an attempt to transfer the right which is void until consent of the licensing authority has been obtained.

This rule follows from the fact that consent is a necessary requirement of the transfer of the license and of the business. It has been aptly expressed in the case of *Hart v. Seacoast Credit Corporation,* supra, where the court held that "prior to approval by the Commissioners the purchaser has no title, legal or equitable, in the franchise even though he has paid the purchase price and the seller has executed and delivered documents of title."

To the same effect is the case of *Seattle Curb Exchange v. Knight,* supra, where this court held that the fact that the bankrupt had endorsed his name upon the certificate of ownership in the curb exchange and also had made a written assignment thereof, did not defeat the summary jurisdiction of the court because the necessary consent to the transfer of the seat had not been obtained prior to the filing of the petition in bankruptcy.

We also desire to refer to the case of *O'Dell v. Boyden,* supra, which was cited with approval by this court in the *Seattle Curb Exchange* case, supra, and by the United States Supreme Court in the *Board of Trade v. Johnson* case, supra.

In the *O'Dell* case the transfer of a seat on the New York Stock Exchange was subject to the consent of the Committee on Admissions of the Exchange, which had not been obtained prior to bankruptcy. The court said, at page 736:

> "But the transfer is not made except by the acceptance of a candidate for membership who is elected in the place and stead of the retiring member. When a 'transfer' of membership is made, according to the terms, which clog such transfers, the transferee becomes a member and the transferor ceases to be one. It follows therefore *that the mere execution of a paper preparatory to transfer or assigning a membership works no change in membership whatever.*" (Italics ours.)

Since the actual possession of the paper evidencing the incorporeal right and the question of endorsement do not affect the constructive possession of the right itself, we believe that there is no need to discuss at length the question of who was the possessor of the paper at the time of the filing of the petition. In fact, at that time the Police Department was in actual possession of the paper evidencing the permit, and was therefore a bailee for the bankrupt until the transfer should be approved. The intention of the

Police Department was to return the paper only to the person in whose name the permit was then standing, i. e., the owner of the permit. The bankrupt was always the owner of the permit, as the application for the transfer of the permit was rejected. The Department, therefore, held the paper as a bailee of the bankrupt at the date of the filing of the petition. However, we do not believe that there is particular need to stress this element of the case since the determination of the question who had possession of the paper does not add anything to the determination of the constructive possession of the incorporeal right, which is the factor upon which the summary jurisdiction of the court depends.

C. DOES APPELLEE MAKE A SUBSTANTIAL ADVERSE CLAIM, OR IS HIS CLAIM MERELY COLORABLE?

Independent of the question of constructive possession, which we have discussed above, the bankruptcy court had summary jurisdiction because appellee's claim is only colorable.

The case of *Taubel-Scott-Kitzmiller Co. v. Fox,* supra, expressly distinguishes between the question of actual and constructive possession, and the further alternative that "the property is held by one who makes a claim but the claim is colorable only."

Following the construction of the statute by the Supreme Court it has been said, in the case of *Matter of Midland United Co.,* 22 Fed. Supp. 751, 36 A. B. R. (N. S.) 914, 921:

> "It is only where the debtor in bankruptcy does not have possession of the property that the question as to whether the claim is colorable arises."

See, also, the recent case of *Bank of California v. McBride* (C. C. A. 9th), 132 Fed. (2d) 769, 52 Am. B. R. (N. S.) 141, 146, where this court said:

> "The court had summary jurisdiction in the premises if, when the bankruptcy petition was filed, the property was actually or constructively in the possession of the bankrupt; or if at that time possession was held by a person who made no adverse claims to the property, or whose adverse claims was determined on inquiry to be merely colorable."

The Referee has quoted (Tr. f. 24) the case of *Matter of Western Rope and Mfg. Co.,* C. C. A. 8, 298 Fed. 926, affirmed on certiorari, *Harrison v. Chamberlin,* 278 U. S. 198; 46 Sup. Ct. 467, 70 L. Ed. 897, where the Circuit Court of Appeals laid down the test for appellant whether the claim is adverse or merely colorable, by stating, at page 927:

> "The application of this rule involves a definition of what is meant by colorable. In our judgment the meaning of that word as used in this connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant, there is as a matter of law, no adverseness in the claim."

The Supreme Court, in affirming the decision, defined a colorable claim as follows (70 L. Ed. 900):

> "Without entering upon a discussion of various cases in the circuit courts of appeals in which divergent views have been expressed as to the test to be applied in determining whether an adverse claim is substantial or merely colorable, we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy', Board of Education v. Leary, supra, in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

See, also, *May v. Henderson,* 268 U. S. 119; 45 Sup. Ct. Rep. 456; 69 L. Ed. 875; *Matter of Weing,* 104 Fed. (2d) 112, 40 A. B. R. (N. S.) 248; *Matter of Meiselman,* 105 Fed. (2d) 995; 40 A. B. R. (N. S.) 792.

Under the above definition of a colorable claim by the United States Supreme Court it is apparent that appellee's claim is merely colorable, because in the absence of the necessary consent by the Police Commission he could not validly acquire any rights to the license which under the San Francisco Police Code is transferable only upon such consent.

We again refer to the California case of *Teachout v. Bogy,* supra, where the California law has been determined to the effect that in the case of a business which is subject to a license, the invalid transfer of

a license affects the validity of all agreements between the parties, which are connected with the transfer of the license, particularly the transfer of the business itself. Thus, appellee, by his agreements with the bankrupt, whatever their nature, could not acquire any valid rights which would interfere with the passing of the license to the trustee in bankruptcy, so that his claim to the taxicab permit is merely colorable and therefore subject to summary jurisdiction irrespective of the question of possession.

CONCLUSION.

We therefore conclude that on either of the theories presented in this brief, the bankruptcy court has summary jurisdiction.

To summarize, the two theories are:

1. That the license, being an incorporeal right, at the time of the filing of the bankruptcy petition was legally owned by and therefore in the possession of the bankrupt.

2. That the claim which appellee makes to the license is merely colorable because the consent of the Police Commission of the City and County of San Francisco, which was a prerequisite to the transfer of the license, was not granted, so that he cannot assert a valid adverse claim to the license.

We therefore submit that the District Court erred in affirming the order of the Referee denying the sum-

mary jurisdiction and quashing the service of the order to show cause, and respectfully submit that this court reverse the judgment of the United States District Court.

Dated, San Francisco,
July 16, 1943.

DINKELSPIEL & DINKELSPIEL,
B. H. MULDARY,
Attorneys for Appellant.

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No. 10,424

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN O. ENGLAND, Trustee of the Estate of John Nyhan, Bankrupt,

Appellant,

vs.

DAVID NYHAN,

Appellee.

BRIEF FOR APPELLEE.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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BRIEF FOR APPELLEE.

APPELLEE HAD SUCH POSSESSION OF THE TAXICAB PERMITS AS TO ENTITLE HIM TO A PLENARY SUIT.

In response to an order to show cause issued by the Referee in Bankruptcy on the 10th day of November, 1942, the Appellee, David Nyhan, on December 5, 1942, filed his verified plea to the Court's jurisdiction. (Tr. ff. 8 et seq.) The matter came on regularly for hearing on December 9, 1942, and after evidence produced by the Trustee and the Trustee having rested, the Referee sustained the Appellee's objection to the jurisdiction. (Tr. f. 19.)

In his petition for an order to show cause the Trustee alleged:

> "That said Respondent David Nyhan and Respondent bankrupt herein have joint possession

and control of the above described taxi license, that Respondent David Nyhan now holds possession of said taxi license as agent and as trustee for said Respondent bankrupt." (Tr. f. 5.)

Assuming the foregoing allegation to be true, then unquestionably, in the absence of any objection, or assertion of an adverse claim on the part of Appellee herein, David Nyhan, the Court legally would have been entitled to hold that the Bankrupt's joint possession was sufficient, under the law, to enable the Court to pass upon, in a summary proceeding, David Nyhan's interest, if any, in the permit in controversy. However, the Bankruptcy Court could not ignore the statements made, under oath, by David Nyhan in his verified plea to the Court's jurisdiction, i.e.:

"That before the petition in involuntary bankruptcy was filed in the District Court of the United States for the Northern District of California, Southern Division, the Respondent, David Nyhan, was and now is the owner and entitled to possession of that certain taxi license, issued by the Police Commission of the City and County of San Francisco, State of California, and mentioned in the Trustee's Petition. Any interest of the Bankrupt, James Nyhan, by reason of the issuance thereof in said Bankrupt's name in said taxi license is held in trust by said Bankrupt for Respondent, David Nyhan.

"Respondent further alleges that the said Bankrupt, James Nyhan, has no ownership in said taxi license nor the possession thereof, and that said taxi license at no time was and not now is

a part of the assets of said bankrupt's estate." (Tr. f. 10.)

What was the evidence developed at the hearing?

The only witness called by the Trustee was the Bankrupt; not under Section 21a of the Bankruptcy Act but as his own witness and as a consequence the trustee was bound by the testimony of said witness:

> "Q. These documents, including your permit were returned to you by the Police Department, were they not?
>
> The Witness. A. They were returned to my brother. He was in possession of the permit since the time he arrived from the East. Sergeant Trainor would not turn it over to anybody but the one the permits were in, James Nyhan. I was there, my brother was there, we both received it." (Tr. f. 19.)

It will be noted that by brother the witness meant, the Appellee, David Nyhan, and that David Nyhan "returned from the East in 1939 or 1940". (Tr. f. 14.) The petition in involuntary bankruptcy was filed on December 2, 1941. (Tr. f. 18.)

It should be borne in mind at the outset that the burden of proof in the proceeding was on the Trustee to establish grounds for summary jurisdiction.

See

City of Long Beach v. Metcalf (C.C.A.), 103 F. (2d) 483.

Ordinarily the joint possession of the bankrupt, even with an adverse claimant, would justify the Court in

proceeding summarily, but that rule is inapplicable herein for the reason that David Nyhan having set up his adverse claim to the effect that said bankrupt is David Nyhan's agent, trustee or bailee, the Bankruptcy Court was bound by the rule that where one holds possession under the conditions claimed by David Nyhan, that the possession of the bankrupt is the possession of David Nyhan, and hence the Court is without jurisdiction in a summary proceeding to deal with the adverse claimant's purported interest in the license in question but must be adjudicated in a plenary action.

In the case of *Sproul v. Levin* (C.C.A.), 88 F. (2d) 866, in connection with summary proceedings, the Court said:

> "Hardly is there a question of law better settled than that a court of bankruptcy has no jurisdiction to hear and adjudicate in a summary proceeding a controversy as to title and ownership of property held adversely to the bankrupt estate and against the consent of the adverse claimant, and where such property came into the claimant's possession prior to the filing of the petition in bankruptcy, exceptions above set out excepted; but in such case, resort must be had by the trustee to a plenary action."

The only evidence the trustee produced was to the effect that the permits were in the name of the bankrupt, James Nyhan, at the time the bankruptcy proceedings were started. Appellee made that same allegation in his objections to the jurisdiction of the Bankruptcy Court as may be above noted, but the

said permits were held by the bankrupt as trustee for Appellee.

Here there is a clear cut controversy as to title to the permit held adversely to the bankrupt estate and such controversy must be heard in a plenary suit.

The Referee had preliminary jurisdiction to inquire into the nature of the defendant's possession and into any adverse claim so far as to see whether it is more than colorable. He made such inquiry and found he had no jurisdiction. This was in his discretion to do and such discretion cannot be disturbed on appeal unless there was a clear cut abuse thereof but which is not present in the instant case.

> "The fact that they assert an interest or title adverse to the bankrupt does not require a plenary proceeding, although of course the court in its discretion might direct the trustee to resort to such."
>
> *Chandler v. Perry* (C.C.A.), 74 F. (2d) 371.

Also in

> *Autin v. Piske* (C.C.A.), 24 F. (2d) 626, 627:
> "Of course, a claim may be adverse and substantial even though in fact fraudulent and voidable; but the referee is not bound by the mere statement of the claim, and may make a preliminary inquiry as to the facts to determine whether it is colorable. However, when the evidence develops that there is reasonable room for controversy, he must desist and remit the trustee to a plenary suit in a court of competent jurisdiction."

Also in

In re Bastarchury Corporation (C.C.A.), 62 F. (2d) at page 541.

"However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but having the power in the first instance to determine whether it has jurisdiction to proceed, the court may enter into a preliminary inquiry to determine whether the claim is real and substantial or merely colorable. And if found to be merely colorable the court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceedings" *Mueller v. Nugent,* 184 U.S. 15; *Taubel v. Fox,* 264 U.S. 433.

The Referee in the instant case found that the adverse claim of Appellee, David Nyhan, was real and substantial and even though such adverse claim be voidable, its voidability must be determined in a plenary proceeding. The Bankruptcy Court was adjudicated by the Referee not to be the proper tribunal to decide the issue upon the merits.

Appellant in his brief contends that because the permits were in the name of the bankrupt he therefore was the owner of them and entitled to the possession thereof and that such possession of the bankrupt was the possession of the Bankruptcy Court and that the Bankruptcy Court could summarily adjudicate upon them. But, the Appellee in his sworn objections to the jurisdiction alleged that he and not the bankrupt was the owner and entitled to possession of the permit and that any interest of the bankrupt, James Nyhan,

by reason of the issuance thereof in said bankrupt's name in the permit is held in trust by the bankrupt for Appellee, David Nyhan.

Let us assume that the bankrupt could not transfer the permit without the approval of the police commission. Let us also assume that any agreement between the bankrupt and the Appellee was therefore void. Under the doctrine of the case of *Autin v. Piske,* supra, such voidability must be determined in a plenary suit.

On behalf of the trustee, the complaint is made that because the trustee "did not submit the matter to the Court for its decision but rested on his affirmative and opening case the Court on the record could not have been fully advised as to the law and facts." (Tr. f. 22.)

It is quite evident that what seemingly is overlooked in this contention is the vital factor that the Court must decline jurisdiction as soon as the substantiality of the adverse claimant's claim is made to appear, and in this proceeding that substantiality appeared as soon as Appellee, David Nyhan's verified plea to the jurisdiction was placed before the Court, and the Trustee had ceased to present further testimony to show the jurisdiction in the Bankruptcy Court, so far as was and is concerned the summary determination of the rights of Appellee, David Nyhan.

See:

Benjamin v. Central Trust Co. (C.C.A. 7), 216 F. 887, 888, 889

wherein it is said:

> "The District Court may pursue the summary method to the point of ascertaining that the alleged adverse claim is substantial and not merely colorable. But substantiality appears as soon as the claimant, in response to the rule to show cause, presents his verified answer which is unmet by the trustee, or which, if met by replication, is supported by sworn testimony of facts which if true would show title and possession antedating the petition in bankruptcy. A conclusion that the alleged adverse claim is a cover for the claimant's possession as agent or bailee of the bankrupt cannot be permitted to be reached by the District Court's rejection of the sworn answer and testimony, and thereupon finding that the alleged adverse claim is fraudulent. That end can only be attained if it is the just conclusion of a due trial of a plenary suit."

It will be noted that the trustee did not call the Appellee to explain his verified plea to the jurisdiction. This he could have done under Section 21a of the Bankruptcy Act. So that under the decision of the above case Appellee's substantial claim that he was the owner and entitled to possession of the permit was not met by the trustee and the Bankruptcy Court could not proceed further but held that a plenary suit was necessary.

CONCLUSION.

1. The Bankruptcy Court did not abuse its discretion when it held that it did not have summary jurisdiction.

2. The possession of the permit by the Appellee was sufficiently alleged in Appellee's objection to the jurisdiction which was left unmet by the trustee.

3. The substantiality of the Appellee's adverse claim was found by the Referee to merit its being heard in a plenary suit.

It is therefore submitted that the District Court did not err in affirming the order of the Referee denying the summary jurisdiction and quashing the service of the order to show cause and we respectfully submit that this Honorable Court affirm the judgment of the United States District Court.

Dated, San Francisco,
September 22, 1943.

BERNARD NUGENT,
Attorney for Appellee.

No. 10434

United States
Circuit Court of Appeals
For the Ninth Circuit.

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the will of W. O. Sampson, deceased,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 590 Folsom St., San Francisco 60—7-14-43

No. 10434

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

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Los Angeles, California

For Appellee:

FRANK MERGENTHALER, Esq.

1102 Fidelity Bldg.
Los Angeles, California. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court in and for the Southern District of California, Central Division

At Law No. 7317S

MAE H. SAMPSON, individually and as Executrix under the Will of W. O. Sampson, Deceased,
Plaintiff,

vs.

GALEN H. WELCH, formerly Collector of Internal Revenue for the Sixth Collection District of California,
Defendant.

COMPLAINT

REFUND OF FEDERAL ESTATE TAXES

Comes now Mae H. Sampson, individually and as Executrix under the Will of W. O. Sampson, deceased, the plaintiff above named, and for a cause of action against the defendant, Galen H. Welch, formerly Collector of Internal Revenue for the Sixth Collection District of California, alleges:

I.

That the said W. O. Sampson was the husband of the plaintiff, Mae H. Sampson; that the plaintiff is a resident of the County of Los Angeles, State of California, and that the jurisdiction of this Court is dependent upon a Federal question in that the cause of action arises under the laws of the United States of America pertaining to the Internal Revenue, to-wit: the Revenue Act of 1926.

II.

That at the time of the collection from the plaintiff as Executrix under the Will of the said W. O. Sampson, deceased, and the disbursements to the defendant of the Federal estate taxes hereinafter referred to, the defendant, Galen H. Welch was the Collector of Internal Revenue in and for the Sixth Collection District of California, and maintained his office as such Collector in the City of Los Angeles, State of California. [2] That the said Galen H. Welch retired from his office as such Collector of Internal Revenue on or about the 30th day of June, 1933, and was not in office as such Collector at the time of the commencement of this action.

III.

That this action is brought against the defendant as an officer of the United States of America acting under and by virtue of the Revenue Act of 1926, and on account of acts done by the defendant under color of said office and of the Revenue Laws of the United States as will hereinafter more fully and at large appear.

IV.

That on the 23rd day of May, 1929, and for a long time prior thereto, the said W. O. Sampson, sometimes called William O. Sampson, and the plaintiff, Mae H. Sampson, were husband and wife respectively. That the said W. O. Sampson and Mae H. Sampson had been residents of the State of California from about the year 1909. That on

the said 23rd day of May, 1929, the plaintiff, Mae T. Sampson and the said W. O. Sampson, made, executed and delivered each to the other a written agreement, a copy of which is set forth in "Exhibit A" hereto annexed and made a part hereof by reference.

V.

That the said W. O. Sampson departed this life on the 28th day of December, 1930, at the City of Los Angeles, State of California, having first made and published his Last Will and Testament in writing, which was duly admitted to probate by the Superior Court of the State of California, in and for the County of Los Angeles on the 23rd day of January, 1931; that a copy of the said Will is hereto annexed, marked "Exhibit B" and made a part hereof by reference. That the said Superior Court granted and issued to Mae H. Sampson, under the name of [3] Mae Sampson, letters testamentary upon the said Will. That the said Mae H. Sampson has been at all times since the issuance of said letters testamentary and now is the duly acting and qualified Executrix under the Will of the said W. O. Sampson, deceased, and has not been discharged or removed from her office as such Executrix.

VI.

That the said agreement dated May 23, 1929, hereinbefore referred to has at all times since said date remained in full force and effect.

VII.

That on or about the 2nd day of August, 1932, the Superior Court of the State of California, in and for the County of Los Angeles, made and entered its order of distribution under the Will of said decedent by which all of the property of the said decedent was distributed to Mae H. Sampson under the terms of the said Last Will and Testament.

VIII.

That on or about the 21st day of December, 1931, the plaintiff, as Executrix under the Will of W. O. Sampson, deceased, filed with the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, a Federal return for Federal estate taxes upon the estate of the said W. O. Sampson, deceased, pursuant to the provisions of the Revenue Act of 1926. That the return so filed by the plaintiff disclosed a net taxable estate of $237,136.21. That thereafter the Bureau of Internal Revenue audited the said tax return and made certain adjustments therein, claiming that the net estate subject to Federal estate taxes was $294,606.15, upon which the Bureau of Internal Revenue asserted a net estate tax of $2,316.16. That between December 16, 1931, and December 28, 1932, the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, paid to the defendant, Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, the [4] following amounts upon account of said estate tax; said pay-

ments having been made upon the dates set opposite each amount:

Date of Payment	Amount Paid
December 16, 1931	$ 1,197.00
December 23, 1932	223.81
December 28, 1932	254.21
Total amount paid between said dates	$ 1,675.11

That of the amounts so paid the sum of $1,429.90 was erroneously and illegally collected by the defendant for the reason that the plaintiff, Mae H. Sampson, as an individual, had a vested interest in one-half of the community property owned by the decedent and the said Mae H. Sampson; which said one-half interest was not subject to the Federal estate tax upon the death of the said W. O. Sampson. That the said vested one-half interest in the said property was acquired by the said Mae H. Sampson under and by virtue of the terms of the said agreement dated May 23, 1929, a copy of which is set forth in "Exhibit A" hereto annexed. That said agreement was not made in contemplation of death, and the Bureau of Internal Revenue declined and refused to recognize the validity of said agreement and the effect thereof and included in the gross estate of the decedent, W. O. Sampson, the one-half interest belonging to the plaintiff, Mae H. Sampson, and computed the estate tax upon the interest of both W. O. Sampson and Mae H. Sampson in the property. That had the Bureau of Internal Revenue given effect to the said agreement the correct Federal estate tax liability of the estate of W. O. Sampson, deceased, would have

been $245.21 instead of $2,316.16 as determined by the Commissioner of Internal Revenue; that the correct computation of the Federal estate tax liability of the estate of W. O. Sampson is set forth in detail in "Exhibit A", a copy of which is hereto anexed.

IX.

That on or about the 24th day of November, 1933, and [5] within three years from the date of the payment by the plaintiff, as Executrix under the Will of W. O. Sampson, deceased, to the defendant of the said sum of $1,429.90, the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, filed with the Collector of Internal Revenue at Los Angeles, California, a written claim for refund of the Federal estate tax so erroneously assessed and collected by the defendant from the plaintiff, as Executrix under the Will of W. O. Sampson, deceased. That the basis of the claim for refund was the same as that set forth in this complaint, to-wit: that the Commissioner of Internal Revenue erroneously included in the gross taxable estate of W. O. Sampson, deceased, the interest in the property acquired by the plaintiff, Mae H. Sampson under the terms and provisions of the said agreement dated May 23, 1929; a true and correct copy of said claim for refund is hereto annexed, marked "Exhibit A", and made a part of this complaint.

X.

That thereafter, to-wit, on or about the 13th day of July, 1934, the Commissioner of Internal

Revenue, by his duly authorized Deputy, in writing, notified the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, that the said claim for refund so filed by her as aforesaid, was rejected in its entirety.

XI.

That the defendant erroneously and unlawfully collected, and is now erroneously and unlawfully withholding, the above mentioned sum of $1,429.90 so paid by the plaintiff as Executrix under the Will of W. O. Sampson, deceased, to the defendant and the said defendant is indebted to the plaintiff in the said sum of $1,429.90, with interest on the sum of $951.88 at the rate of 6% per annum from the 16th day of December, 1931, until paid, together with interest on the sum [6] of $223.81 from the 23rd day of December, 1932, at the rate of 6% per annum until paid, together with interest on the sum of $254.21 from the 28th day of December, 1932, at the rate of 6% per annum until paid.

XII.

That no action upon the claim herein referred to, other than herein set forth, has been taken before Congress or before any of the departments of the Government of the United States, or in any court. That no assignment or transfer of said claim has ever been made, and plaintiff is the sole owner thereof. That plaintiff is justly entitled to the amount herein claimed from the defendant

and there is no just credit or offset against said claim which is known to the plaintiff.

Wherefore, the plaintiff prays judgment against the defendant in the sum of $1,429.90, with interest on the sum of $951.88 at the rate of 6% per annum from the 16th day of December, 1931, until paid, together with interest on the sum of $223.81 from the 23rd day of December, 1932, at the rate of 6% per annum until paid, together with interest on the sum of $254.21 from the 28th day of December, 1932, at the rate of 6% per annum until paid, together with her costs of suit.

FRANK MERGENTHALER
Attorney for Plaintiff. [7]

EXHIBIT A

CLAIM

To Be Filed With the Collector Where Assessment Was Made or Tax Paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California
County of Los Angeles—ss:

(Type or Print)

Name of taxpayer or purchaser of stamps Estate of W. O. Sampson, deceased

Business address 213 No. Norton Avenue
(Street)

Los Angeles California
(City) (State)

Residence _____

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th District of California

2. Period (if for income tax, make separate form for each taxable year) from _____, 19___, to _____, 19____

3. Character of assessment or tax Federal estate tax.

4. Amount of assessment, $2,316.16; dates of payment 12/16/31—12/23/32—12/28/32

5. Date stamps were purchased from the Government _____

6. Amount to be refunded $1,429.90

7. Amount to be abated (not applicable to income or estate taxes) $_____

8. The time within which this claim may be legally filed expires, under Section 319 (b) of the Revenue Act of 1926, on December 24, 1935

The deponent verily believes that this claim should be allowed for the following reasons:

This claim is based upon the statement of facts here to annexed, marked Exhibit A, and made a part of this claim by reference.

(Attach letter size sheets if space is not sufficient)

Signed ESTATE OF W. O. SAMPSON,
deceased
By MAE H. SAMPSON
Executrix

Sworn to and subscribed before me this 21 day of November, 1933.

[Seal] JESS CHENOWETH,
(Signature of officer administering oath)
Notary Public
(Title)

My Commission Expires June 8th, 1935. [8]

EXHIBIT A

Statement of Facts Annexed to Claim of Estate of W. O. Sampson for Refund of Federal State Tax.

W. O. Sampson and Mae H. Sampson were husband and wife, and were for many years prior to the date of the death of the said W. O. Sampson residents of the State of California. At the time they took up their residence in that state they had no separate property. On May 23, 1929, the said W. O. Sampson and Mae Sampson entered into an

agreement of which the following is a true and correct copy: [10]

This Agreement, made this 23rd day of May, 1929, between William O. Sampson, first party, and Mae Sampson, second party, both residing at Los Angeles, California,

Witnesseth: Whereas, the parties hereto intermarried on or about October 3, 1899, and since that time have been and now are husband and wife and living together as such; and

Whereas, said parties, since the date of their marriage have acquired certain property which, by virtue of the laws of the State of California and/or written agreement between the parties hereto, is the community property of the parties hereto; and the parties hereto are desirous that the rights and interests of the respective parties hereto in and to all their community property be expressly defined and established in accordance with the terms and provisions hereof;

Now, Therefore, in consideration of the love and affection which each of the parties hereto bears unto the other and of other good and valuable consideration, moving from each of the parties unto the other, it is hereby agreed as follows:—

1. That all property now owned by the first party shall be and the same is hereby declared to be community property of the parties hereto.

2. That the respective interests of the parties hereto in their community property during continuance of the marriage relation are and shall be present, existing and equal interests under the

management and control of the husband, first party hereto, as is provided in Sections 172 and 172 (a) of the Civil Code of the State of California.

3. That this agreement is intended and shall be construed as defining the respective interests and rights of the parties hereto in and to all community property, and the rents, issues and profits thereof, heretofore or hereafter acquired by the parties hereto during the continuance of said marriage relation.

First party does hereby assign, transfer and convey unto second party such right, title and interest in and to said community property as may be necessary to carry into full force and effect the terms of this instrument.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

WILLIAM O. SAMPSON
MAE SAMPSON. [11]

State of California
County of Los Angeles—ss.

On this 23rd day of May, 1929, before me, Laura J. Henderson, a Notary Public in and for said County, personally appeared William O. Sampson and Mae Sampson, known to me to be the persons whose named are subscribed to the within instrument and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] LAURA J. HENDERSON

Notary Public in and for the County of Los Angeles, State of California.

My commission expires Mar. 4, 1930. [12]

Section 158 of the Civil Code of the State of California, at the time of the execution of the said agreement, provided as follows:

> "Husband and wife may make contracts. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts."

Section 161a of the Civil Code of the State of California, effective as of July 29, 1927, provides as follows:

> "Interests in community property. The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

It is the contention of the claimant that by virtue of the said agreement and of the foregoing sections of the law of California that at the date of the death of W. O. Sampson, to-wit: December 28, 1930, all of the property owned by the decedent and the said Mae H. Sampson, his wife, was community property in which she had a vested interest to the extent of one-half thereon, and that the share or interest so vested in her was not subject to Federal estate tax upon the death of the said W. O. Sampson.

In computing the Federal estate tax upon the estate of the said decedent, the share of the said Mae H. Sampson was included therein and the Federal estate tax was computed thereon. The tax so assessed thereon has been partially collected. That of the amount so collected $1,429.90 was erroneously and illegally collected. The said sum of $1,429.90 is made up as follows: [13]

Total gross estate as per Conferee's Revision dated July 28, 1932			$493,109.15	
Total deduction as per Conferee's Revision		$198,503.00		
Less:				
Widow's allowance	$ 22,000.00			
Exemption	100,000.00	122,000.00	76,503.00	
Total net community property				$416,606.15
Less vested interest of Mae H. Sampson under agreement of May 23, 1929				208,303.07
				$208,303.08
Widow's allowance			$ 22,000.00	
Exemption			100,000.00	122,000.00
Net estate subject to Federal Estate Tax				$ 86,303.08

COMPUTATION OF TAX

Tax on	$ 50,000.00	$ 500.00
Tax at 2% on	36,303.08	726.06
Taxable net estate	$ 86,303.08	
Total Federal Tax		$ 1,226.06
Less credit for California Inheritance Tax		980.85
Correct net Federal Estate Tax		$ 245.21
Amount of tax paid Dec. 16, 1931	$ 1,197.09	
Amount of tax paid Dec. 23, 1932	223.81	
Amount of tax paid Dec. 28, 1932	254.21	
Total tax paid	$ 1,675.11	
Correct tax liability	245.21	
Total overpayment of Tax	$ 1,429.90	

[14]

EXHIBIT B

WILL

I, William Orlando Sampson, a resident of the City of Los Angeles, County of Los Angeles, State of California, being of the age of forty-six years, do make, publish and declare this my Last Will and Testament, hereby revoking all former wills by me at any time made.

First: I give, bequeath and devise to my beloved wife, Mae Sampson, all of my property of every kind and nature whatsoever and wheresoever situated.

Second: I make no provision for our children, Wilma Maud Sampson, Ruth Anna Sampson, Ralph Herrick Sampson and Clement Griffith Sampson, but leave the care and maintenance of said children to my said wife.

Third: I hereby nominate and appoint my said wife, Mae Sampson, executrix of this my Last Will and Testament, and request that she shall not be required to give any bond for the faithful performance of her duties as such executrix. And I hereby authorize my said executrix to sell, lease or otherwise dispose of all or any part of my said estate without the order of any Court, at either public or private sale, with or without notice, and for such consideration and upon such terms as my said executrix may see fit.

In Witness Whereof, I have hereunto signed my name at Los Angeles, California, on this 9th day of November, 1918.

WILLIAM ORLANDO SAMPSON.

The foregoing instrument was, at the date hereof, by the said William Orlando Sampson signed and published as, and declared to be, his Last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of

each other, have subscribed our names as witnesses hereto.

W. W. MILLER,
Residing at 1943 So. Arlington St., Los Angeles.
W. E. GOODHUE,
Residing at 319 N. Jackson St., Glendale, Calif.

(Complaint Duly Verified by Mae H. Sampson, Aug. 30, 1935.) [15]

[Endorsed] Filed Aug. 30, 1935. [16]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in above entitled action, and in answer to plaintiff's complaint, admits, denies and alleges:

I.

Admits the allegations contained in paragraphs I, II, III, and X of plaintiff's complaint.

II.

In answer to paragraph IV of plaintiff's complaint, defendant has not information or belief sufficient to enable him to answer and on that ground denies each and every allegation therein contained.

III.

In answer to paragraph V of plaintiff's complaint defendant denies each and every allegation therein contained, except the allegation that W. O. Sampson departed this life on the 28th day of December, 1930.

IV.

In answer to paragraphs VI and VII of plaintiff's complaint defendant has not information of belief sufficient to enable him to answer, and on that ground denies each and every allegation in said paragraphs contained.

V.

In answer to paragraph VIII of plaintiff's complaint, defend- [17] ant admits that on or about the 21st day of December, 1931, the plaintiff, as executrix under the Will of W. O. Sampson, deceased, filed with the defendant a Federal estate tax return upon the estate of said decedent; that the returns so filed by plaintiff disclosed a net taxable estate of $237,136.21; that thereafter the Bureau of Internal Revenue audited said tax return, made certain adjustments therein, claiming that the net estate subject to Federal estate taxes was $294,606.15 upon which the Bureau of Internal Revenue asserted a net estate tax of $2,316.16; that between December 16, 1931, and December 28, 1932, the plaintiff, as such Executrix, paid to the defendant the amounts alleged in said paragraph of plaintiff's complaint, upon account of said estate tax; that the Bureau of Internal Revenue declined

and refused to recognize the validity and effect of the agreement of May 23, 1929, between plaintiff and said decedent and included in the gross estate of said decedent the one-half interest which plaintiff claims and alleges was vested in her at the date of her husband's death, and computed the estate tax upon all of the property and not upon a one-half interest therein.

Defendant denies each and every other allegation in paragraph VIII of plaintiff's complaint contained.

VI.

In answer to paragraph IX of plaintiff's complaint defendant admits that on or about the 24th day of November, 1933, the plaintiff filed with the Collector of Internal Revenue at Los Angeles a written claim for refund of said Federal estate tax; that the basis of the claim for refund was that the Commissioner erroneously included in the gross taxable estate of said decedent the interest in the property alleged to have been acquired by the plaintiff under the terms and provisions of said alleged agreement of May 23, 1929.

Defendant denies each and every other allegation in said paragraph IX contained. [18]

VII.

In answer to paragraph XII of plaintiff's complaint defendant has not information or belief sufficient to enable him to answer and on that ground denies each and every allegation therein contained, except that defendant specifically denies that plain-

tiff is justly or otherwise entitled to the amount in her complaint claimed from the defendant, and denies that there is no just credit or offset against said claim.

Wherefore, having fully answered, defendant prays that he be hence dismissed with his costs in this behalf expended.

PEIRSON M. HALL,
United States Attorney.
E. H. MITCHELL,
Spec. Asst. U. S. Attorney.
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue.
Attorneys for Defendant. [19]

(Duly Verified.)

[Endorsed]: Filed Dec. 26, 1935. [20]

[Title of District Court and Cause.]

STIPULATION WAIVING TRIAL BY JURY

It Is Hereby Stipulated on behalf of the parties above named by their respective counsel that trial of the said cause by jury is hereby waived and that the same may be tried by Court.

Dated: September 15th, 1936.

FRANK MERGENTHALER,
Attorney for Plaintiff.
PEIRSON M. HALL,
United States Attorney.
E. H. MITCHELL,
Special Asst. United States Attorney.
ALVA C. BAIRD,
Special Attorney, Bureau of Internal Revenue.
EUGENE HARPOLE,
Special Attorney, Bureau of Internal Revenue,
Attorneys for Defendant.

[Endorsed]: Filed Sept. 15, 1936. [21]

PLAINTIFF'S EXHIBIT No. 1

[Title of District Court and Cause.]

STIPULATION AS TO FACTS

The parties hereto by their undersigned counsel of record hereby stipulate and agree that the fol-

lowing facts in the above case shall be taken and deemed by the Court as proved upon the filing of this stipulation, subject to the right of either party to introduce other and further evidence not inconsistent with the terms of this stipulation.

I.

W. O. Sampson was the husband of the plaintiff, Mae H. Sampson. The said W. O. Sampson and the plaintiff, Mae H. Sampson, were married on or about the 3rd day of October, 1899. The plaintiff is a resident of the County of Los Angeles, State of California, and the jurisdiction of this Court is dependent upon a Federal question in that the cause of action arises under the laws of the United States of America pertaining to the Internal Revenue, to-wit: the Revenue Act of 1926.

II.

At the time of the collection from the plaintiff as Executrix under the Will of the said W. O. Sampson, deceased, and the payments to the defendant of the Federal estate taxes hereinafter referred to, the defendant, Galen H. Welch, was the [22] Collector of Internal Revenue in and for the Sixth Collection District of California, and maintained his office as such Collector in the City of Los Angeles, State of California. The said Galen H. Welch retired from his office as such Collector of Internal Revenue on or about the 30th day of June, 1933, and was not in office as such Collector at the time of the commencement of this action.

III.

This action is brought against the defendant as an officer of the United States of America acting under and by virtue of the Revenue Act of 1926, and on account of acts done by the defendant under color of said office and of the Revenue Laws of the United States as will hereinafter more fully and at large appear.

IV.

On the 23rd day of May, 1929, and for a long time prior thereto, the said W. O. Sampson, sometimes called William O. Sampson, and the plaintiff, Mae H. Thompson, were husband and wife respectively. The said W. O. Sampson and Mae H. Sampson had been residents of the State of California from about the year 1909.

V.

The said W. O. Sampson died on the 28th day of December, 1930.

VI.

On or about the 21st day of December, 1931, the plaintiff, as Executrix under the Will of W. O. Sampson, deceased, filed with the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, a return for Federal estate taxes upon the estate of the said W. O. Sampson, deceased. The return so filed disclosed a net taxable estate of $237,136.21. Thereafter the Bureau of Internal Revenue audited the said tax [23] return and made certain adjustments therein, claiming that the net estate subject to Federal

estate taxes was $294,606.15, upon which the Bureau of Internal Revenue asserted a net estate tax of $2,316.16. Between December 16, 1931, and December 28, 1932, the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, paid to the defendant, Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, the following amounts upon account of said estate tax; said payments having been made upon the dates set opposite each amount:

Date of Payment	Amount Paid
December 16, 1931	$ 1,197.09
December 23, 1932	223.81
December 28, 1932	254.21
Total amount paid between said dates	$ 1,675.11

VII.

The Bureau of Internal Revenue declined and refused to recognize the validity and effect of an alleged agreement claimed by the plaintiff to have been made, executed and delivered between the plaintiff, Mae H. Sampson, and the said William O. Sampson, dated the 23rd day of May, 1929, a copy of which alleged agreement is set forth as part of "Exhibit A" attached to the complaint herein, and included in the gross estate of the decedent, William O. Sampson, the one-half interest in the property claimed to have been acquired by the plaintiff, Mae H. Sampson, under and by virtue of the said alleged agreement.

VIII.

On or about the 24th day of November, 1933, the plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, a written claim for refund of the Federal estate tax so assessed and collected by the defendant from the plaintiff, as Executrix under the Will of W. O. Sampson, deceased. The basis of the claim for refund was that the Commissioner of [24] Internal Revenue erroneously included in the gross taxable estate of W. O. Sampson, deceased, the interest in the property claimed to have been acquired by the plaintiff, Mae H. Sampson, under the terms and provisions of the said alleged agreement dated May 23, 1929.

IX.

Thereafter, to-wit, on or about the 13th day of July, 1934, the Commissioner of Internal Revenue, by his duly authorized Deputy, in writing, notified the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, that the said claim for refund so filed by her as aforesaid was rejected in its entirety.

X.

That no part of the sums so paid by the plaintiff, Mae H. Sampson, as Executrix of the estate of W. O. Sampson, deceased, to the defendant as hereinbefore set forth, has been paid, refunded or credited, and there is no offset against the claim of the plaintiff herein for a refund of the same.

XI.

No action upon the claim for refund hereinbefore

referred to, other than as herein set forth, has been taken before Congress or before any of the Departments of the Government of the United States, and that no action has been brought upon said claim for refund except the present action.

XII.

The total gross estate upon which the United States Bureau of Internal Revenue computed the estate tax upon the estate of W. O. Sampson was $493,109.15, which said value was fixed as of December 28, 1930, the date of the death of said W. O. Sampson. This amount is made up as follows:

Real Estate, all of which is situate in the State of California		$ 32,842.46
Real estate, all of which is situate in the State of California, held in joint tenancy by the		
		[25]
decedent and the plaintiff, Mae H. Sampson..		35,532.88
Corporate Common and Preferred stocks evidenced by certificates		312,273.88
Corporate bonds payable to bearer with interest accrued to December 28, 1930		8,974.90
Unsecured negotiable [Initialed F.M., E.H.M.] promissory notes with accrued interest thereon and checks payable to W. O. Sampson		25,959.91
Life insurance payable to the plaintiff, Mae H. Sampson	$109,331.88	
Less amount exempt under Section 302 (g) of the Revenue Act of 1926	40,000.00	
		69,331.88
Salary (bonus) accrued at the date of decedent's death		6,213.24
Household furniture and automobile		1,980.00
Total Gross Estate		$493,109.15

The said sum of $493,109.15 includes the one-half interest in the property claimed by the plaintiff, Mae H. Sampson under and by virtue of the terms of the said alleged agreement dated May 23, 1929, hereinbefore referred to. Of the property above mentioned all of the real estate, including that held in joint tenancy, was acquired after 1917 and prior to the 29th day of July, 1927. The unsecured promissory notes were acquired by W. O. Sampson in 1928. The accrued salary above mentioned was earned in 1930. All of the above mentioned stocks and bonds were acquired subsequent to 1917, and the household furniture and automobile were acquired subsequent to 1917.

Dated: Los Angeles, California, December 14, 1936.

FRANK MERGENTHALER,
Attorney for Plaintiff.
PEIRSON M. HALL,
U. S. Attorney.
EDWARD H. MITCHELL,
Spec. Asst. U. S. Attorney.
ALVA C. BAIRD,
Spec. Attorney, Bureau of Internal Revenue.
EUGENE HARPOLE,
Spec. Attorney, Bureau of Internal Revenue.
Attorneys for Defendant.

[Endorsed]: No. 7317-S—Plaintiff's Exhibit No. 1. Filed Dec. 14, 1936. [26]

At a stated term, to-wit: The February Term, A. D. 1937, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 31st day of August in the year of our Lord one thousand nine hundred and thirty-seven.

Present: The Honorable Albert Lee Stephens, District Judge.

[Title of Cause.]

ORDER VACATING ORDER OF SUBMISSION

Frank Mergenthaler, Esq., appearing for the plaintiff; Eugene Harpole, Special Assistant Attorney of the United States Treasury Department;

Counsel stipulate and it is ordered that the order of submission to Judge Stephens be, and it is, vacated and set aside and the cause is submitted to Judge Jenney on the same evidence and briefs now on file, with the privilege of either party or the Court to request reargument.

105/678 [27]

At a stated term, to-wit: The February Term, A. D. 1938, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los An-

geles on Wednesday, the 18th day of May in the year of our Lord one thousand nine hundred and thirty-eight.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

ORDER DENYING REQUEST FOR SPECIAL FINDINGS, ETC.

First: The requests for special findings, heretofore made subsequent to the date of trial and submission of the case, are denied.

Second: Counsel may, on Monday, June 6, 1938, at three o'clock p. m., reopen the case for the sole purpose of taking evidence as to the date of acquisition of certain stocks, bonds, household furniture, automobile and other personal property; it being understood that such reopening is not to be considered as a rehearing and evidence and argument are to be so limited. Should counsel find it unnecessary to take the time of the Court in this regard they should so notify the Court to that effect as soon as possible.

Third: Counsel may have one week thereafter, that is to and including the 13th day of June, 1938, within which to present to the Court computations showing the agreed amount or amounts to be inserted in the judgment.

Fourth: If counsel are unable to agree upon such computations, the Court will, on Thursday, June 16, 1938, at eight-thirty o'clock a. m., permit the reopening of the case in strict accordance with the

provisions of Rule 50 of the Rules of Practice before the United States Board of Tax Appeals, in order to determine final computations.

Fifth: Findings of fact and conclusions of law in accordance with the Court's opinion, as modified, should be presented on or before June 22, 1938.
109/670 [28]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION AS TO FACTS

The parties hereto by their undersigned counsel of record hereby stipulate and agree that the following additional facts in the above case shall be taken and deemed by the Court as proved upon the filing of this stipulation.

I.

That of the property included by the Commissioner of Internal Revenue in computing the Federal Estate Tax upon the Estate of W. O. Sampson, the plaintiff's decedent, (a) that which is itemized in "Exhibit A", hereto annexed and made a part of this stipulation, was separate or community property acquired prior to July 29, 1927, upon the dates indicated in said Exhibit; (b) that the property which is itemized in "Exhibit B" hereto annexed and made a part of this stipulation, was community property acquired between July 29, 1927, and May 23, 1929, upon the dates indicated in said Exhibit; (c) that the property which is itemized

in "Exhibit C" hereto annexed and made a part of this stipulation, was community property acquired between May 23, 1929, and December 28, 1930, upon the dated indicated in said Exhibit; (d) that the property which [29] is itemized in "Exhibit D", hereto annexed and made a part of this stipulation, was joint tenancy property of the decedent and Mae H. Sampson, his wife, acquired upon the dates indicated in the said Exhibit; (e) that the proportions of proceeds of life insurance policies attributable to community income earned between July 29, 1927, and December 30, 1928, is set forth in "Exhibit E", hereto annexed and made a part of this stipulation.

II.

(a) That the aggregate values of each item of property listed in Exhibits A, B, C, D and E are the gross values fixed by the Commissioner of Internal Revenue in computing the Federal Estate Tax upon the decedent's estate. That the total gross values as so fixed are as follows:

Exhibit	A	$367,658.91
"	B	26,399.86
"	C	21,057.58
"	D	35,532.88
"	E	82,266.67
	Total	$532,915.90

III.

(a) That the values hereinbefore set forth are gross values without any deductions for debts, exemptions or allowances. (b) That in computing the

net estate of the decedent the Commissioner allowed the following exemptions and deductions as indicated in Plaintiff's Exhibit No. 4 offered and received in evidence at the trial of the above cause:

Miscellaneous deductions	$ 98,503.00
Specific exemptions	100,000.00
Life insurance exemptions	40,000.00
Total	$238,503.00

The amounts of said deductions and exemptions are not in issue in this case. [30]

IV.

That hereto annexed is a computation of the Federal Estate Tax and of the overpayment of the same computed in accordance with the revised opinion of Hon. Ralph E. Jenney filed in the above case. It is expressly stipulated by the parties hereto that the said computation is without prejudice to the right of either party to contest the computation of the tax and the overpayment as computed in said "Exhibit F", upon the basis of the final determination of the law of the case, and that either party herein to have the right of redetermination of the said Federal Estate Tax and the amount of overpayment of the same, if any, in accordance with the final judgment in the above case.

V.

It is expressly stipulated that this stipulation does not give effect to the agreement between W. O. Sampson and the plaintiff Mae H. Sampson, dated May 23, 1929, introduced and received in evidence

as plaintiff's Exhibit 7 herein, and that the plaintiff does not waive the said agreement or its effect upon any of the property hereinbefore mentioned.

Dated this 6th day of June, 1938.

FRANK MERGENTHALER,
Attorney for Plaintiff.
BEN HARRISON,
United States Attorney.
E. H. MITCHELL,
Asst. U. S. Attorney.
ALVA C. BAIRD,
Asst. U. S. Attorney.
ARMOND MONROE JEWELL,
Asst. U. S. Attorney.
EUGENE HARPOLE,
Spec. Atty. Bureau of Internal Revenue.
By ARMOND MONROE JEWELL,
Attorneys for Defendant.

[31]

EXHIBIT A

PROPERTY ACQUIRED BEFORE JULY 29, 1927

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule A	1	Real Est. 901-3 E. 9th St., Los Angeles	5- 1-24	By Purch.	12,842.46
"	2	Real Est. 213 N. Norton Ave., Los Angeles	5-1923	By Purch.	20,000.00
B	1	3857.5 Shares—Bullock's	6-15-22	By Gift	92,580.00
"	1	7292.5 Shares—Bullock's	9-1925	By Purch.	175,020.00
"	21	100 Shares—Bullock's	6-16-22	By Gift	10,000.00
"	34	$100 L. A. Union Term. Bond	3-1924	By Purch.	110.50
"	35	$1000 Miller & Lux, 7%	12-16-25	By Purch.	887.11
"	37	$2000 Oakmont Country Club, 6% Bond	3- 1-23	By Purch.	1,004.50
"	38	$1000 Pacific SS. Co. 6½% Bond	1-30-25	By Purch.	350.00
"	39	$1000 Pacific Palisades Assn., 6½% Bond	3- 9-27	By Purch.	1,005.90
C	1	Note of John G. Bullock	5-11-27	By Purch.	12,883.33
"	2	Note of P. G. Winnett	5-11-27	By Purch.	12,883.33
"	16	Life Ins. Pol.—Penn. Mutual Life Ins. Co. #1114796	5- 5-24	By Purch.	3,011.91
"	17	Life Ins. Pol.—Union Central Life Ins. Co. #745121	1-13-23	By Purch.	3,260.07

Property Acquired Before July 29, 1927—(Continued)

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule C	18	Life Ins. Pol.—Provident Mutual Life Ins. Co. #406,409	5- 4-22	By Purch.	5,347.87
"	19	Life Ins. Pol.—Provident Mutual Life Ins. Co. #424100	1-15-23	By Purch.	3,309.47
"	20	Life Ins. Pol.—Provident Mutual Life Ins. Co. #461463	5- 3-24	By Purch.	3,032.65
"	21	Life Ins. Pol.—Provident Mutual Life Ins. Co. #505528	11-17-25	By Purch.	2,204.82
"	24	Life Ins. Pol.—Provident Mutual Life Ins. Co. #276752	5- 4-17	By Purch.	6,898.42
D-2	1	Household Goods	Prior to 7-29-27	By Purch.	900.00
"	2	Household Goods	Prior to 7-29-27	By Purch.	80.00
		Bank Account—Omitted in Return, Added by Revenue Agent's Report	Unknown		46.57
					$367,658.91

EXHIBIT B

PROPERTY ACQUIRED BETWEEN JULY 29, 1927, AND MAY 23, 1929

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule B	9	5 Shares Dilfer Bond & Mtg. Co., Common	9-23-27	By Purch.	450.00
"	9	5 Shares Dilfer Bond & Mtg. Co., Common	7-30-28	By Purch.	450.00
"	11	10 Shares General Mills, No Par Common	4-30-28	By Purch.	461.25
"	14	15 Shares Pac. Amer. Fire Ins. Co., Common	12- 8-28	By Purch.	375.00
"	19	20 Shares Van de Kamp's Holland-Dutch Bakers	7-30-28	By Purch.	600.00
"	21	200 Shares Bullock's, Inc. Pref.	1928	By Purch.	20,000.00
"	29	5 Shares Van de Kamp's Holland-Dutch Bakers	7-30-28	By Purch.	425.00
"	30	$1000 Bullock's, 6%, 1947 Gold Bonds	10-13-27	By Purch.	994.60
"	32	$1000 Chicago Great Western Ry., 4% Bond	5- 3-29	By Purch.	658.11
"	33	$1000 Home Service Co., 6½%, 1942 Bond	12-15-27	By Purch.	985.90
D-2	3	Packard Motor Car	9-14-28	By Purch.	1,000.00
					$ 26,399.86

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EXHIBIT C

PROPERTY ACQUIRED BETWEEN MAY 23, 1929, AND DECEMBER 28, 1930

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule B	2	15 Shares America Safety Razor Corp., No par com	5- 6-30	By Purch.	840.00
"	3	15 Shares Caterpillar Tractor Co., no par common	10-31-29	By Purch.	384.37
"	3	5 Shares Caterpillar Tractor Co., no par common	6-11-30	By Purch.	128.13
"	3	10 Shares Caterpillar Tractor Co., no par common	9-29-30	By Purch.	256.25
"	4	50 Shares Citizens Nat'l Tr & Sav Bank, common	12-30-29	By Purch.	4,000.00
"	5	10 Shares Columbia Gas & Electric Co., common	5-1930	By Purch.	327.50
"	6	2 Shares Columbia Oil & Gasoline Co., common	1930	By Purch.	9.25
"	8	50 Shares Curtis Wright Corp., no par common	6-1929	By Purch.	112.50
"	10	10 Shares General Foods Corp., no par common	1930	By Purch.	472.25
"	12	12 Shares General Motors Corp., common	9-29-30	By Purch.	409.50
"	13	10 Shares Nat'l Dairy Prod. Corp., no par common	6-1930	By Purch.	373.75
"	15	25 Shares Packard Motor Corp., no par common	6-11-30	By Purch.	209.38

Property Acquired Between May 23, 1929, and December 28, 1930—(Continued)

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule B	16	12 Shares Phillips Petroleum Co., no par com.	9-30-30	By Purch.	156.00
"	17	12 Shares Taylor Milling Corp., no par common	9-29-30	By Purch.	234.00
"	18	20 Shares Union Oil Co. of Calif., common	9-1930	By Purch.	422.50
"	19	10 Shares Van de Kamp's Holland Dutch Bakers, Inc.	8-21-29	By Purch.	300.00
"	20	10 Shares Walworth Co., no par common	4-24-30	By Purch.	112.25
"	22	10 Shares Commonwealth & Southern Corp.	1930	By Purch.	905.00
"	24	10 Shares Wm. Filene's Sons Co., Pref.	9-30-30	By Purch.	905.00
"	25	12 Shs Gamewell Co.	6-10-30	By Purch.	730.00
"	26	15 Shares Grand Union Co., convertible preferred	5- 6-30	By Purch.	540.00
"	29	1 Share Van de Kamp's Holland Dutch Bakers, Pref.	8-21-29	By Purch.	85.00
"	31	$1000 Caterpillar Tractor Co., 5%, 1935 Bond	1930	By Purch.	962.22
"	36	$1000 Nat'l Dairy Prod. Co. 1948 Bond	8- 5-30	By Purch.	1,008.12
"	40	$1000 Sinclair Cons. Oil Corp., 7%, 1937 Bond	1930	By Purch.	1,007.94
D-2	4	1930 Bonus—Bullock's	1930	Earned	6,166.67
					$ 21,057.58

EXHIBIT D

JOINT TENANCY PROPERTY

Reported on Fed. Est. Tax Return	Item	Assets	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule D-1	1	Real Estate—907-9 East 9th St., Los Angeles	4- 1-24	By Purch in Jt. Ten.	18,000.00
"	2	Real Estate—4242-4242½ Normal Ave., Los Angeles	Prior to Jan. '24	"	8,000.00
"	3	Real Estate—Lot 59, Tr. 1971, Los Angeles Co.	Prior to Jan. '24	"	600.00
"	4	Bank Acc't—Citizens Nat'l Tr & Sav Bank—Portion acquired prior to	7-29-27	"	828.78
"	4	Bank Acc't—Citizens Nat'l Tr & Sav Bank—Portion acquired between 7-29-27 &	5-23-29	"	144.50
"	4	Bank Acct—Citizens Nat'l Tr & Sav Bank —Portion acquired between	5-23-29 & 12-28-30	"	7,253.83
"	5	Fidelity Sav. and Loan Assn. certificate	Prior to 5-23-29	"	516.32
"	6	Sav. Acct—First Nat'l Bank of Los Angeles	Prior to 1- 1-24	"	189.45
					$ 35,532.88

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Mae H. Sampson 11

EXHIBIT E

PROPORTION OF PROCEEDS OF LIFE INSURANCE ATTRIBUTABLE TO PREMIUMS PAID BETWEEN 7-29-27 and 12-30-28.

Reported on Federal Est. Tax Return	Item	Policy	Proportion of Commissioner's Final Valuation
Schedule C	16	Penn. Mutual Life Ins. Co. #1114796	2,027.70
"	17	Union Central Life Ins. Co. #745121	1,794.74
"	18	Provident Mutual Life Ins. Co. #406409	2,782.16
"	19	Provident Mutual Life Ins. Co. #424100	1,733.71
"	20	Provident Mutual Life Ins. Co. #461463	1,992.79
"	21	Provident Mutual Life Ins. Co. #505528	2,799.99
"	22	Provident Mutual Life Ins. Co. #577113	6,034.00
"	23	Provident Mutual Life Ins. Co. #582438	15,000.00
"	24	Provident Mutual Life Ins. Co. #276752	3,101.58
"	26	New England Mutual Life Ins. Co. #61451	15,000.00
"	25	New England Mutual Life Ins. Co. #690423 Acquired 11-4-30	10,000.00
"	27	New England Mutual Life Ins. Co. #690424 Acquired 11-4-30	20,000.00
			$ 82,266.67

[36]

EXHIBIT F

COMPUTATION OF NET ESTATE AND OF FEDERAL ESTATE TAX AND OVERPAYMENT THEREON

COMPUTATION OF NET ESTATE

Gross Estate	
Computed in accordance with Judge Jenney's revised opinion	450,287.41
Less	
Amount of Insurance exempt	40,000.00
	410,287.41
Deductions—as per conferee's report, dated July 28, 1932 (Plaintiff's Exhibit No. 4)	198,503.00
Net Estate	211,784.41

COMPUTATION OF TAX

Net Estate	211,784.41	
1% on	50,000.00	500.00
	161,784.41	
2% on	50,000.00	1,000.00
	111,784.41	
3% on	100,000.00	3,000.00
4% on	11,784.41	471.38
Aggregate Federal Estate Tax		4,971.38
Credit for California Inheritance tax Paid		3,977.10
Federal Estate Tax as per Judge Jenney's Revised Opinion		994.28
Tax Paid by Plaintiff		1,675.11
Revised Tax		994.28
Overpayment of Tax		680.83

[Endorsed]: Filed Jun. 6, 1938. [37]

[Title of District Court and Cause.]

SECOND SUPPLEMENTAL STIPULATION AS TO FACTS

The parties hereto, by their respective counsel undersigned, hereby stipulate and agree that the following additional facts in the above entitled action shall be taken and deemed by the court as proved upon the filing of this stipulation.

I.

Each of the two parcels of real estate referred to in Exhibit A attached to the Supplemental Stipulation as to Facts filed herein and dated June 6, 1938 (reported as Items I and 2 of Schedule A in Plaintiff's Estate Tax Return), was at the time of its purchase and acquisition deeded to plaintiff's husband, W. O. Sampson, and, continuously thereafter, stood of record in his sole name until after his death.

All of the certificates representing the shares of stock referred to in said Exhibit A were, at the times of their acquisitions, issued to, and in the sole name of, plaintiff's said husband and, continuously thereafter, stood in his sole name until after his death.

The bonds referred to in said Exhibit A were payable to bearer and at the time of their acquisition were delivered to and purchased by plaintiff's said husband with funds earned by him prior to July 29, 1927.

Each of the promissory notes referred to in said Exhibit A [38] was drawn to the sole order of

plaintiff's said husband and none was indorsed by him during his lifetime.

The life insurance items referred to in said Exhibit A represent the proportions of the proceeds of each of the seven listed policies attributable to premiums earned and paid by plaintiff's said husband prior to July 29, 1927. The premiums referred to in Exhibit E attached to said Supplemental Stipulation as to Facts were paid by plaintiff's said husband out of compensation for services rendered by him after July 29, 1927 and prior to his death.

II.

All of the certificates representing shares of stock referred to in Exhibit B attached to said Supplemental Stipulation as to Facts were at the time of their acquisition issued to, and in the sole name of, plaintiff's said husband and, continuously thereafter, stood in his sole name until after his death.

The bonds referred to in said Exhibit B were payable to bearer and at the time of their acquisition were delivered to and purchased by plaintiff's said husband with funds earned by him after July 29, 1927, and before May 23, 1929.

III.

All of the certificates representing shares of stock referred to in Exhibit C attached to said Supplemental Stipulation as to Facts were at the time of their acquisition issued to, and in the sole name of, plaintiff's said husband and, continuously thereafter, stood in his sole name until after his death.

The bonds referred to in said Exhibit C were payable to bearer and at the time of their acquisition were delivered to and purchased by plaintiff's said husband with funds earned by him after May 23, 1929.

The bonus item listed at the foot of said Exhibit C was compensation paid for services rendered his employer by plaintiff's said husband. [39]

IV.

It is expressly stipulated that this stipulation does not give effect to the agreement between W. O. Sampson and the plaintiff Mae H. Sampson, dated May 23, 1929, introduced and received in evidence as plaintiff's Exhibit 7 herein, and that the plaintiff does not waive the said agreement or its effect upon any of the property hereinbefore mentioned.

Dated this 30th day of June, 1938.

FRANK MERGENTHALER,
Attorney for Plaintiff.
BEN HARRISON,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Jul. 1, 1938. [40]

[Title of District Court and Cause.]

THIRD SUPPLEMENTAL STIPULATION AS TO FACTS

The parties hereto, by their respective counsel undersigned, hereby stipulate and agree that the following additional facts in the above entitled action shall be taken and deemed by the court as proved upon the filing of this stipulation.

I.

Each of the three items of joint tenancy real property referred to in Exhibit D attached to the Supplemental Stipulation as to Facts filed herein and dated June 6, 1938, was purchased by plaintiff's husband, W. O. Sampson, with funds earned by him prior to July 29, 1927. The portion of the bank account with Citizens National Trust and Savings Bank of Los Angeles, referred to in said Exhibit D as having been acquired prior to July 29, 1927, consisted of funds earned and deposited by plaintiff's said husband prior to said date. The portion of said bank account referred to in said Exhibit D as having been acquired between July 29, 1927 and May 23, 1929, consisted of funds earned and deposited by plaintiff's said husband between said dates. The portion of said bank account referred to as having been acquired between May 23, 1929 and December 28, 1930, consisted of funds earned and deposited by plaintiff's said husband between said dates. The Fidelity Savings and Loan Association certificate referred to in said Exhibit D was

purchased by plaintiff's said husband with funds earned by him after July 29, 1927. The [41] First National Bank savings account referred to in said exhibit consisted of funds earned and deposited by plaintiff's said husband prior to January 1, 1924.

II.

It is expressly stipulated that this stipulation does not give effect to the agreement between W. O. Sampson and the plaintiff Mae H. Sampson, dated May 23, 1929, introduced and received in evidence as plaintiff's Exhibit 7 herein, and that the plaintiff does not waive the said agreement or its effect upon any of the property hereinbefore mentioned.

Dated this 5th day of August, 1938.

FRANK MERGENTHALER,
Attorney for Plaintiff.
BEN HARRISON,
United States Attorney.
E. H. MITCHELL,
Asst. U. S. Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 6, 1938. [42]

At a stated term, to-wit: The September Term, A. D. 1940, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held

at the Court Room thereof, in the City of Los Angeles on Thursday the 9th day of January in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable Ralph E. Jenney, District Judge.

[Title of Cause.]

MINUTE ORDER VACATING OPINION PREVIOUSLY RENDERED (23 FED. SUPP. 271)

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit in the case of United States v. Goodyear, 99 F. 2d 523, having been called to the Court's attention; and it appearing to the court from an examination of said opinion that that case is involved facts almost identical—in legal effect—with those in the case at bar; and it further appearing to this Court that the said decision of the Ninth Circuit Court of Appeals in said Goodyear case is controlling, as a matter of legal precedent, over the issues in the case at bar, even though the opinion heretofore rendered in this cause (Sampson v. Welch, 23 Fed. Supp. 271) expresses the view of this court as to a proper determination of said issues.

It is therefore hereby ordered that the opinion heretofore rendered in this case be and it is hereby vacated and withdrawn; that findings, conclusions and judgment in accordance with the opinion in United States v. Goodyear, supra, be prepared by counsel for plaintiff herein, for presentation to this

court for signature in accordance with the provisions of Rule 8 of the rules of this court.

So ordered.

Dated: January 9th, 1941.

RALPH E. JENNEY,
United States District Judge.

17/211 [43]

[Title of District Court and Cause.]

ORDER OF SUBSTITUTION

This cause coming on regularly for hearing on the 16th day of February, 1942, on motion of plaintiff's attorney, Frank Mergenthaler, Esq., for the substitution of Josephine Welch Overton as a party defendant in the place and stead of Galen H. Welch, deceased, and it appearing to the Court that the said Galen H. Welch, the original defendant herein died on July 25, 1941, and that Josephine Welch Overton has been duly appointed Executrix of the Will of said Galen H. Welch, deceased, and that the claim set forth in the complaint was not extinguished by the death of said Galen H. Welch, deceased, and the Court being satisfied in the premises,

It Is Ordered that Josephine Welch Overton, Executrix of the Will of said Galen H. Welch, deceased, be and she is hereby substituted for the said Galen H. Welch, deceased, as a party defendant herein without prejudice to the proceedings [44] already had and that the case may be continued and maintained by the plaintiff above named

against the said Josephine Welch Overton as the personal representative of the said Galen H. Welch, deceased.

Dated: February 16th, 1942.

RALPH E. JENNEY,
Judge of the United States District Court.

Approved as to form as provided by Rule 8.

E. H. MITCHELL,
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 16, 1942. [45]

[Title of District Court and Cause.]

SUPPLEMENTAL COMPLAINT

Comes now Mae H. Sampson, Individually and as Executrix under the Will of W. O. Sampson, Deceased, the plaintiff above named, and with leave of Court first had and obtained, files this her Supplemental Complaint, and alleges as follows:

I.

That since the filing of the complaint in the above case the following events have occurred:

(a) That Galen H. Welch, the defendant named in the original complaint on file herein, on or about the 25th day of July, 1941, departed this life leaving a Last Will and Testament in writing.

(b) The said Last Will and Testament has been duly admitted to probate by the Superior Court of the State of [46] California, in and for the County of Los Angeles.

(c) Letters Testamentary upon the said Last Will and Testament of the said Galen H. Welch, deceased have been issued by the Superior Court to Josephine Welch Overton, the Executrix named in the said Last Will and Testament.

(d) The said Josephine Welch Overton is now the duly appointed, qualified and acting Executrix of the Estate of said Galen H. Welch, deceased.

(e) Notice to Creditors of the said Galen H. Welch, deceased was first published on August 29, 1941.

(f) The plaintiff herein filed with the Clerk of the said Superior Court her claim against the said estate of Galen H. Welch, deceased, in the sum of $1429.90 for Federal Estate taxes which the plaintiff claims were erroneously and illegally levied, assessed and collected upon the estate of the said W. O. Sampson, deceased, by the said Galen H. Welch, acting in his capacity as a Collector of Internal Revenue; the said claim being the identical claim which is the subject matter of the above action; said claim was filed on Feb. 4, 1942.

(g) Under date of March 29, 1942, the said Josephine Welch Overton, as Executrix of the Estate of said Galen H. Welch, deceased, rejected the said claim in writing.

(h) The said Josephine Welch Overton as Executrix of the estate of said Galen H. Welch, deceased, has been substituted as defendant in the above action in the place and stead of the said Galen H. Welch, deceased.

FRANK MERGENTHALER,
Attorney for Plaintiff. [47]

It Is Hereby Stipulated by the undersigned as attorney of record for the plaintiff above named and by Wm. Fleet Palmer, United States Attorney and E. H. Mitchell, Assistant United States Attorney, as attorneys of record for the defendant Josephine Welch Overton, as Executrix of the estate of Galen H. Welch, deceased, that the Court may make an order granting leave to the plaintiff to file in the above action the foregoing Supplemental Complaint.

FRANK MERGENTHALER
Attorney for Plaintiff.
WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Asst. U. S. Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

It is so ordered. The plaintiff to serve upon counsel for the said Josephine Welch Overton, as Executrix of the estate of Galen H. Welch, deceased, a copy of said Supplemental Complaint. The said defendant is granted to and including the 10th day of June, 1942, within which to file an Answer to the said Supplemental Complaint.

Dated at Los Angeles, California, this 9th day of May, 1942.

RALPH E. JENNEY,
U. S. District Court Judge.

[Endorsed: Filed May 9, 1942. [48]

[Title of District Court and Cause.]

ANSWER TO SUPPLEMENTAL COMPLAINT

Comes Now the defendant Josephine Welch Overton, as Executrix of the Estate of Galen H. Welch, Deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California, and in answer to Plaintiff's Supplemental Complaint, admits each and every allegation therein contained.

WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Ass't. U. S. Attorney.

[Endorsed]: Filed June 10, 1942. [50]

[Title of District Court and Cause.]

DEFENDANT'S OBJECTIONS TO FORM OF FINDINGS AND CONCLUSIONS (LOCAL RULE 8)

Comes Now the defendant and objects to the form of the findings and conclusions drafted and proposed by plaintiff's counsel and served upon defendant on the 5th day of August, 1942. These objections are made upon the grounds that (a) such proposed findings and conclusions are incomplete, (b) they carefully evade the issues raised and de-

cided by the Court, (c) they are misleading, and (d) they fail to comply with the requirements of Rule 52(a) of the Rules of Civil Procedure, in the [51] particulars pointed out below.

Among the four main issues raised at the trial and decided by the Court in this case were the following three:

First: Whether the "interest" in the husband's property given to the donee, wife, in 1929, was, under the laws of California, an "interest therein of the surviving spouse", within the meaning of Section 302(b) of the Revenue Act of 1926.

Second: Whether the husband, donor, in and by the 1929 gift or at any time before death, completely relinquished and transferred to the donee all his rights and powers of disposition, possession, enjoyment, dominion, management and control over the subject of the gift; whether he then or at any time before death transferred and completely relinquished to his wife all of his economic benefits arising from the transferred "interest"; and whether then or at any time before death the 1929 gift to his wife was completed; all within the meaning of Section 302(c) of the same Act.

Third: Whether the enjoyment by the donee of the interest transferred to her in 1929 was, at the time of the donor's death, subject to any change through the exercise by decedent of a retained power to alter, amend or revoke, within the meaning of Section 302(d) of the same Act.

Plaintiff's counsel proposes no express findings of fact or conclusions of law whatever in response

to the above three issues which were argued at length by counsel, considered by the trial court, and [52] treated at length in its scholarly opinion (23 F. Supp. 271-291).

Instead, the Court is requested by counsel to make two findings (XVIII and XIX) and one conclusion (VI) to the effect that the gift was not made in contemplation of death, a fact that was not questioned but was conceded by defendant at the trial. (23 F. Supp. 276, column 1.)

Further, instead of proposing findings upon the issues actually tried, the Court is asked to find (Finding XXIX, p. 15) that the Bureau declined to recognize the validity and effect of the agreement of May 23, 1929. This, also, was not an issue. The validity and effect of the agreement was likewise conceded by the Government at the trial. (23 F. Supp. 276, column 1.)

This apparent endeavor by plaintiff to violate Rule 52(a) and at the same time to conceal, by findings and conclusions, the real issues here decided, is not due to a lack of skill in draftsmanship.

Omissions under First Issue:

The decision upon the First issue above will not be clear or complete in form, and will not comply with Rule 52(a), unless the trial Court makes findings or conclusions, either affirmative or negative, upon the following litigated questions:

1. Whether the "community interest" in property given in 1929 to the surviving donee was an interest created by statute, an interest protected against in-

vasion during marriage, and an interest intended to aid in the protection of widows, grass widows and their children against want?

2. Whether the California Legislature, immediately before enacting chapter 103 of the laws of 1850 relating to marital property, considered and compared the merits and demerits of the common and civil law types of widows' estates; whether it finally and on April 13, 1850, chose a modified civil law or community type instead of the common law or dower type; and whether by statute, and at the same time, it expressly rejected dower? [53]

3. Whether historically, functionally and in the method of its creation, the community property interest of the decedent's widow resembles in any particulars the marital property interests of surviving wives in the other states of the Union, and, if so, findings as to each such likeness; whether such interest is an incident of marriage; whether the property to which such interest of the wife attached resembles in any particulars that to which attaches the interest of surviving wives in the other states of the Union, and, if so, findings as to each such likeness; whether such interest ripened into an estate absolute upon her husband's death; whether by last will and testament decedent could have put the widow to an election between taking such interest or taking under his will; whether such interest became a part of decedent's probate estate; whether immediately upon her husband's death such interest became a fixed estate in specific property

or attached only to the residue; and whether such interest was ascertainable and distributable only by a court of probate administering the decedent's estate?

4. Whether the words "in lieu of", as used in Section 302(b) of the Revenue Act of 1926, mean "instead of"?

5. Whether the value of the property here involved, to the extent of the marital interest therein given to the widow in 1929, was at the time of decedent's death exactly one-half of the whole value of the property?

Omissions under Second Issue:

The decision upon the Second issue above will not be clear or complete in form, and will not comply with Rule 52(a), unless the trial Court makes findings or conclusions, either affirmative or negative, upon the following litigated questions:

1. Whether the agreement of 1929 was entered into by the parties for the purpose of reducing Federal income taxes?

2. Whether, in and by such 1929 agreement or at any time before [54] his death, the decedent transferred and completely relinquished to the donee all his rights and powers of disposition, possession, enjoyment, dominion, management and control of the property or interest therein transferred to the donee; and, if not, whether such rights and powers of the donor ceased, and then vested in the donee for the first time, upon and by virtue of the donor's death?

3. Whether, in and by the 1929 agreement or at any time before the donor's death, all of the economic benefits arising from ownership of the subject matter of the gift were transferred and completely relinquished to the donee; and, if not, whether all such economic benefits of the donor ceased, and then vested in the donee for the first time, upon and by virtue of the donor's death?

4. Whether, in and by such 1929 agreement or at any time before the donor's death, there was transferred from him to the donee the legal burdens and obligations incident to the ownership of the transferred property and interest; and, if not, whether such legal burdens and obligations of the donor ceased, and were then imposed upon the donee for the first time, upon and by virtue of the donor's death?

5. Whether the property or the interest therein transferred to the wife in 1929 would have become a part of her probate estate had she predeceased the donor intestate?

6. Whether the property or the interest therein transferred to the wife in 1929 would have reverted to decedent had the donee predeceased him intestate; and, if so, whether such possibility of reverter ceased or was relinquished upon and by virtue of the donor's death?

7. Whether the property or the interest therein transferred to the wife was subject to execution for her debts or obligations at any time before the donor's death; if not, whether it became subject to the donee's debts and obligations for the first time

upon and by virtue of the donor's death; whether the property or interest therein [55] transferred to the wife was subject, both before and after the donor's death, to execution for his personal debts and obligations contracted either before or after the transfer; and whether such property or transferred interest was subject after the donor's death to administration expenses and a family allowance?

8. Whether, after the 1929 gift, the donor was still vested until his death with the exclusive legal right and power to discharge his personal debts and obligations out of the transferred property and out of the donee's interest therein, without the consent or knowledge of the donee.

9. Whether, in and by the 1929 agreement, the value, at the time of his death, of the decedent's interests, rights and powers in, to and over the subject matter of the gift was reduced to any extent or degree; and, if so, the amount of such reduction.

10. Whether, to the extent of the Federal income tax savings, the donor was richer after the 1929 gift than before?

11. Whether, in managing and controlling the property and the donee's interest therein after the transfer, decedent occupied the relationship of a common law or statutory agent, trustee or co-partner of or for the donee; whether, in managing and controlling the property and the transferred interest therein after the gift, decedent owed the donee, as principal, beneficiary, co-partner or otherwise, any of the legal duties or obligations, and whether there were imposed upon him any of the legal liabilities,

of a common law or statutory agent, trustee or co-partner; and whether, in managing and controlling the property and the transferred interest therein after the transfer, the decedent enjoyed the legal freedom from personal liability to third persons which is enjoyed by common law and statutory agents, trustees and partners?

12. Whether the 1929 gift was intended to take effect "in possession or enjoyment" at or after the donor's death, within the [56] meaning of Section 302(c) of the Revenue Act of 1926?

Omissions under Third Issue:

The decision upon the Third issue above will not be clear or complete in form, and will not comply with Rule 52(a), unless the trial Court makes findings or conclusions, either affirmative or negative, upon the following litigated questions:

1. Whether, at the time of his death, decedent had the following powers over and in respect of the property to which the transferred interest attached, and whether such powers were legally exercisable by him alone and without the donee's consent, to wit:

(a) The power to use, possess and enjoy the property?

(b) The power to incur and contract debts on the credit of the property either below or in excess of the total value thereof?

(c) The power to sell, mortgage and pledge, to lease for any period of time, and to otherwise deal with and contract respecting, the personal property?

(d) The power by will to confer upon his executor

the power to sell and transfer specific property, both real and personal, in discharge of his personal debts?

(e) The power to lose, break or demolish the personal property and any improvements upon the real property?

(f) The power to waste, squander, speculate with and completely dissipate the personal property and the income from both the real and the personal property in riotous living?

(g) The power to lease or rent the real property [57] for successive periods of one year, or from month to month, without limitation, and to deliver possession and enjoyment of the land to the lessee?

2. Whether, at the time of his death, the decedent had the following additional powers over and in respect of the property to which the transferred interest attached, and whether such powers were legally exercisable by him with the consent of the donee, to wit:

(a) The power to make gifts of the property, real or personal.

(b) The power to sell and mortgage the real property and to lease the same for periods longer than one year?

3. If at the time of his death the decedent possessed any of the foregoing powers over and in respect of the property, whether his exercise thereof before death could have lessened, destroyed, increased or otherwise changed the donee's enjoyment of the interest transferred to her?

4. If at the time of his death the decedent possessed any of the foregoing powers over or in re-

spect of the property, whether his exercise thereof before death could have altered, amended or revoked the 1929 transfer, or could have altered, amended or revoked the donee's enjoyment of her transferred interest?

5. If at the time of his death the decedent possessed any of the foregoing powers, whether the enjoyment of the transferred interest was then subject to any change through the exercise of a power to alter, amend or revoke, within the meaning of Section 302(d) of the Revenue Act of 1926?

Dated: August 8, 1942.

Respectfully submitted,

WM. FLEET PALMER,
United States Attorney

E. H. MITCHELL,
Assistant United States Attorney

By E. H. MITCHELL
Assistant United States Attorney,
Attorneys for Defendant.

[Endorsed]: Filed Aug 8, 1942. [58]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED ANSWER TO ORIGINAL COMPLAINT (R.C.P., Rule 15(b))

To: Above-Named Plaintiff, and to Frank Mergenthaler, Esq., her attorney:

You and Each of You Will Please Take Notice that the defendant will move the Court for leave to file an Amended Asnwer to the Original Complaint, a copy of which is attached hereto and made a part hereof, at the hour of 10:00 o'clock A. M. on Monday, the 14th day of September, 1942, or as soon thereafter as counsel can be heard, in Courtroom No. 3, before the Honorable Ralph E. Jenney, in the Post Office and Court House Building on Spring and Temple Streets in the City of Los Angeles, California.

Said motion will be made pursuant to Rule 15(b) upon all of the [59] pleadings, briefs and opinions filed in this case, upon all Stipulations of Fact and the Reporter's Transcript herein, upon all orders made herein by the Court, upon the points and authorities hereto attached and the grounds therein set forth.

Dated: September 2, 1942.

WM. FLEET PALMER,
United States Attorney.

E. H. MITCHELL,
Assistant United States Attorney.

EUGENE HARPOLE,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
By E. H. MITCHELL
Attorneys for Defendant.

[Endorsed]: Filed Sep. 5, 1942. [60]

[Title of District Court and Cause.]

AMENDED ANSWER TO ORIGINAL COMPLAINT

Comes Now, the defendant in the above-entitled action, leave of Court first had and obtained, and files this her amended answer to plaintiff's original complaint.

Defendant admits, denies and alleges:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V, VI and X of plaintiff's original complaint.

II.

In answer to Paragraph VII thereof, defendant admits that the [61] order of distribution referred to was made and entered on or about the date named; admits that said order of distribution was made under the will of the decedent; and admits that by such other property of the decedent was distributed to his widow under the terms of his will.

In that connection defendant alleges that the widow accepted such distribution under the terms of said

will; that all the property so distributed to her was, at the time of decedent's death, California community property of the type acquired after July 29, 1927 (hereinafter, for convenience, referred to as "new type community"); that the widow would have succeeded to the same property which was distributed to her had decedent not left a will; but that plaintiff, as decedent's widow, elected to take under said will.

Further answering the same Paragraph VII, defendant denies that either "all" of the property of the decedent or "all" of the property of the community was distributed to the surviving widow under the terms of the will or otherwise. In that connection defendant alleges that decedent owned no California separate property at the time of his death; that all of the property that became subject to administration in his probate estate was new type community property, and was all traceable solely to his personal earnings; that all thereof then stood, and continuously from the time of its acquisition had stood, of record in his sole name; that all became a part of his probate estate; and that there was distributed to the surviving widow under said order of distribution, only the residue thereof which remained after the discharge by the executrix of decedent's debts and obligations and the expenses of administering his estate.

III.

In answer to Paragraph VIII, defendant

Admits that on or about the date alleged the

plaintiff filed a Federal estate tax return on behalf of decedent's estate, reporting therein a net taxable estate of $237,136.21; that upon audit of Bureau of Internal Revenue determined the net taxable estate to be $294,606.15 [62] and the tax thereon, $2,316.16; that on account of said tax there was paid by the executrix the amounts alleged in said paragraph upon the dates set forth therein; and that in and by the agreement of May 23, 1929, decedent's wife acquired a California wife's community interest in the properties upon which the instrument operated;

Alleges that decedent's object and purpose in executing said agreement was to minimize Federal taxes; and that, to the extent of his subsequent income tax savings, decedent was richer after the agreement than before;

Admits that said agreement was not made by decedent in contemplation of death, except insofar as his California separate property was thereby transformed into a type of marital property having as its fundamental purpose the partial protection of widows and grass widows against economic want;

Admits that said agreement was valid and effective and that it operated upon the decedent's separate property, upon the spouses' joint tenancy property, and upon the California community property of the type acquired prior to July 29, 1927 (hereinafter, for convenience, referred to as "old type community"); and admits that the Bureau included in the gross estate of the decedent the value of the one-half interest which plaintiff claims and alleges

was vested in her at the time of her husband's death, and computed the estate tax upon the value of all, rather than upon the value of but one-half, of the properties; and

Denies each and every other allegation in Paragraph VIII contained.

IV.

In answer to Paragraph IX thereof, defendant admits that on or about the date named the plaintiff filed with the Collector a written claim for the refund of $1,429.90; and admits that Exhibit "A" attached to plaintiff's original complaint is a true and correct copy of such claim; and [63]

Defendant denies each and every other allegation in said Paragraph IX contained.

V.

Denies the allegations contained in Paragraph XI of plaintiff's original complaint.

VI.

In answer to Paragraph XII theerof, defendant denies that plaintiff is justly or otherwise entitled to the amount claimed by her, or to any other amount, and denies that there is no just credit or offset against said claim.

Further answering plaintiff's original complaint, defendant alleges:

VII.

(a) That in and by the agreement of May 23, 1929, decedent then made a transfer to his wife,

by way of gift, of an interest in his separate properties and in the old type community properties; that said transfer was not, and did not constitute, a bona fide sale for an adequate consideration, or a full consideration, or any consideration, in money or money's worth; and that said transfer was intended to take effect both in possession and in enjoyment at or after the donor's death, within the meaning of Section 302(c) of the Revenue Act of 1926, as hereinafter alleged;

(b) That in and by said instrument of transfer the donor expressly retained the full and exclusive right and power to manage and control all of the properties to which such transferred interest attached, including both the corpus and the income therefrom;

(c) That in and by such instrument the donor retained the full and exclusive dominion over, and the full and exclusive right and power to use, to possess, and to enjoy all of the properties to which such transferred interest attached, including both the corpus and the income therefrom, and to dispose of all thereof for an adequate or [64] inadequate consideration;

(d) That in and by such instrument the donor retained all of the economic benefits, and all of the incidents of ownership, of the properties to which the transferred interest attached, both corpus and income, including, in addition to the foregoing, the following full and exclusive rights and powers, to wit:

(1) To contract and incur personal debts and

personal obligations on the credit of such corpus and income,

(2) To discharge his personal debts and personal obligations out of such corpus and income,

(3) To subject such corpus and income to the discharge, both before and after his death, of his personal debts, personal obligations and the expenses of administering his estate, including a widow's allowance,

(4) To mortgage, pledge, lease, invest, re-invest, and to speculate and otherwise deal with and contract respecting, both the corpus and income of said personal properties and the income from the real properties, and

(5) To lease or rent the real properties for successive periods of one year, and from month to month, without limitation, and to deliver possession and use thereof to the lessee;

(e) That in and by such instrument the donor personally retained all of the ordinary burdens and obligations of ownership of the properties to which the transferred interest attached;

(f) That all of the foregoing rights and powers, so retained by the donor, were exercisable without the donee's knowledge or consent and without accountability to her, were exercisable by him in his unlimited discretion and without liability to her for acts of misfeasance or nonfeasance, and were exercisable by him in the form and mode of a full owner of the properties to which such transferred interest attached; that in the exercise of such re-

tained rights and [65] powers, the donor did not occupy toward the donee the relationship of a common law or statutory agent, trustee or co-partner; that in exercising such retained rights and powers, the donor owed the donee none of the duties or obligations, and there were imposed upon him in favor of the donee none of the liabilities, of a common law or statutory agent, trustee or co-partner; and that in exercising such retained rights and powers, the donor did not enjoy the freedom from liability to third persons which is enjoyed by common law and statutory agents, trustees and co-partners;

(g) That none of the foregoing rights, powers and economic benefits, so retained by the donor, were relinquished in whole or in part prior to his death; that all thereof ceased, and vested in the donee for the first time, upon and solely by virtue of his death and the distribution of his estate; that no part or portion of the burdens or obligations so retained by the donor was relinquished or transferred by him prior to his death; and that all thereof ceased, and were imposed upon the donee for the first time, upon and solely by virtue of the donor's death;

(h) That the donee's interest was so transferred to her

(1) That none thereof, and none of the properties to which it attached, or the income therefrom, could have become a part of her probate estate had she predeceased the donor intestate, and

(2) That none thereof, or of the income therefrom, could ever have become subject to execution for her debts or obligations either before or after her prior death, or during the harmonious marriage of the spouses; and

(i) That in and by such instrument of transfer the indefeasible passing of the gift was dependent upon contingencies which were terminable by the donor's death; that in and by such instrument of transfer the donor also retained the right to a possible return of the gift upon the prior death of the donee intestate; that such retained [66] right ceased upon and because of the donor's death; and that his death brought the gift into enjoyment by the donee.

VIII.

In the alternative, the defendant alleges:

(a) That in and by said agreement the enjoyment of the interest thereby transferred was subject at the date of the donor's death to changes through the exercise by him, both alone and in conjunction with the donee, of numerous powers to alter, amend and revoke, within the meaning of Section 302(d) of the Revenue Act of 1926, as hereinbefore and hereinafter alleged.

(b) That all of the donor's powers alleged and set forth in the foregoing Paragraph VII of this amended answer were exercisable by him alone and without the donee's knowledge or consent, and without liability or accountability to her, continuously from the time of the gift until the moment of his death.

(c) That in and by the instrument of transfer the donor also retained continuously until the moment of his death the full, exclusive and exercisable power to lose, break and demolish the tangible personal properties and any improvements upon the real properties to which the donee's interest attached, without liability or accountability to her therefor.

(d) That in and by such instrument the donor also retained continuously until the moment of his death the full, exclusive and exercisable power to waste, squander, speculate with and completely dissipate the personal properties to which the transferred interest attached, as well as the income therefrom, together with the income from the real properties to which such interest attached, without liability or accountability to the donee therefor.

(e) That in and by such instrument the donor also retained continuously until the moment of his death the full, exclusive and exercisable power by will to confer upon his executor the full power to sell and transfer any one or more of the specific real and personal [67] properties to which the donee's interest attached, for the purpose of discharging his personal debts and obligations.

(f) That in and by such instrument the donor also retained continuously until the moment of his death the powers, exercisable with the consent of the donee.

(1) to make gifts of the properties, both real and personal, to which the transferred interest attached, and

(2) to sell and mortgage the real properties to which such interest attached, and to lease the same for periods longer than one year.

(g) That the exercise by the donor of any of the foregoing powers would have lessened, augmented or otherwise changed and altered the donee's enjoyment of the interest transferred to her.

(h) That the exercise by the donor of any one or more of the following powers would have completely divested the donee of her transferred interest in one or more or all of the properties to which it attached, to wit:

(1) The power to sell the tangible personal properties, and to dissipate the same and the income therefrom, either intentionally or unintentionally, by use, destruction, pledge and mortgage, and by payment of his personal debts and obligations therewith and with the proceeds of any sale, mortgage or pledge thereof;

(2) The power to sell both the tangible and intangible personal properties, and to dissipate the same and the income therefrom, either intentionally or unintentionally, by unsuccessful investment, speculation, pledge and mortgage, and by the payment of his personal debts and obligations therewith and with the proceeds of any sale, mortgage or pledge thereof; and

(3) The power to contract and incur personal debts and obligations amounting to a sum in excess of the value of all the properties to which the donee's interest attached, both real [68] and personal, with

resulting execution sales, bankruptcy or death insolvent.

(i) That in and by such instrument of transfer the indefeasible passing of the gift was dependent upon contingencies which were terminable by, and which terminated upon, the donor's death.

IX.

In the alternative, the defendant alleges:

Defendant realleges and incorporates herein by reference each and all of the allegations contained in Paragraphs VII and VIII hereof, the same as though set forth herein in full.

That all the property, the value of which was included by the Commissioner in decedent's gross estate for estate tax purposes, was community property of the California type, and was traceable solely to decedent's personal earnings and his separate property; and that the widow's community interest therein was an interest therein of a surviving spouse, existing at the time of the decedent's death, within the meaning of Section 302(b) of the Revenue Act of 1926.

That during marriage plaintiff's said interest was an interest protected to some extent against invasion, was an interest conferred by statute upon California wives, and was so conferred for the sole and fundamental purpose of protecting widows and grass widows to some extent against want; that this civil law or community system of marital property was created by statute; that this civil law type of widows'

and grass widows' estate was consciously and deliberately chosen in 1850 by the first session of the California Legislature in lieu of the common law or dower type of widows' estate; and that concurrently with such choice, the Legislature expressly rejected dower by statute.

That both during and after the death of decedent, most of the characteristics of plaintiff's said interest were identical with those of statutory and common law dower; that such interest was strictly an incident of marriage; that it attached to the same type of property to which dower attaches in other states of the Union; that, like dower, it [69] ripened into an estate absolute upon the death of decedent, subject only to the payment of his debts and expenses of administration; that by last will and testament decedent could, and did, put his widow to an election between taking such interest or of taking under his will; that upon his death and after the administration of his estate such interest, for the first time, became a fixed estate in specific property; that such interest was ascertainable and distributable only by a court of probate; that during marriage such interest was not transferable by her to third persons but was relinquishable, nor could she contract debts on the credit thereof or incur liabilities collectible therefrom; and that the value of such interest during marriage was far less than one-half the value of the properties to which it attached.

That the only powers exercisable by plaintiff, during her harmonious marriage to decedent, were

strictly protective and consisted exclusively of the following, to wit:

(1) The negative power to prevent decedent's transfer, mortgage or lease for periods longer than one year of the real estate to which her interest attached, by refusing to consent in writing thereto;

(2) The affirmative power, exercisable for only one year after the filing for record of such a transfer, mortgage or lease of real estate executed by decedent without her written consent, to avoid the same and cause the return thereof to decedent's possession;

(3) The negative power to prevent a gift by decedent of the personal property to which her interest attached, by refusing to consent in writing thereto; and

(4) The affirmative power to set aside gifts of both real and personal properties to which such interest attached, made by the decedent without her written consent, and transfers thereof made in fraud of such interest, and cause the return thereof to decedent's possession. [70]

That the words "in lieu of", as used in Section 302(b) of the Revenue Act of 1926, mean and were intended by Congress to mean "instead of".

X.

In the alternative, the defendant alleges:

That all of the property, the value of which was included by the Commissioner of Internal Revenue in decedent's gross estate for estate tax purposes, was new type California community property, and

was all traceable either to decedent's personal earnings or to his separate property; and that the value so included was the value of the property to the extent of the interest therein of the decedent at the time of his death, within the meaning of Section 302(a) of the Revenue Act of 1926, and was likewise the full value of the property.

Defendant realleges and incorporates herein by reference each and all of the allegations concerning the rights and powers of the decedent in, to and over, and concerning those of the wife in respect of, such property during his lifetime, contained in Paragraphs VII, VIII and IX hereof, the same as though set forth herein in full.

That the wife's interest in such property at the time of decedent's death was not divestible by the Legislature but was divestible by decedent; that such interest of the wife was a property interest wholly unknown to the common law; and that the dominion and full control of, all of the economic benefits flowing from, and all of the incidents of ownership of, the property to which her interest attached, were vested exclusively in the decedent at the time of his death.

That the value of the wife's interest in such property at the time of decedent's death was but nominal, and is incapable of measurement by proof or formula; and that the Commissioner did not err in determining that such interest was valueless.

Wherefore, having fully answered, defendant prays that she be [71] hence dismissed with her costs in this behalf expended.

WM. FLEET PALMER,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
EUGENE HARPOLE,
Special Assistant to the Chief Counsel, Bureau of Internal Revenue.
By.....
Attorneys for Defendant.

(Duly Verified.)

[Endorsed]: Filed Sep. 5, 1942. [72]

At a stated term, to wit: The Sept. Term, A. D. 1942, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 28th day of Sept. in the year of our Lord one thousand nine hundred and forty-two. Present:

The Honorable: Ralph E. Jenney, District Judge

[Title of Cause.]

ORDER AMENDING FINDINGS

This cause coming on for hearing on motion of defendant for leave to file amended answer to the

original complaint, pursuant to notice of motion filed September 5, 1942, continued to this date; Frank Mergenthaler, Esq., appearing as counsel for the plaintiff; E. H. Mitchell, Assistant U. S. Attorney, appearing as counsel for the defendant:

Attorney Mitchell argues in behalf of the Government; the Court makes a statement of its views; and Attorney Mergenthaler makes a statement.

It is ordered that the motion of the defendant for leave to file amended answer be, and it is, denied, and the Court states that, if necessary, the answer may be deemed to be amended to meet the proof. It is further ordered that the findings be amended by adding the following, beginning on page 16:

The allegations of Paragraphs I, II, III, IV, V, VI, and VII of the complaint are true.

The allegations of Paragraph VIII of the complaint are true as modified by the recomputations on file.

The allegations of Paragraphs IX, X, XI, and XII are true.

The allegations of the supplemental complaint are true. [72½]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on the 14th day of December, 1936, before the Court sitting without a jury, trial by jury having

been waived by written stipulation of the parties; plaintiff appearing by Frank Mergenthaler, Esquire, and the defendant appearing by Peirson M. Hall, United States Attorney for the Southern District of California, and Edward H. Mitchell, Assistant United States Attorney for said District, and evidence both oral and documentary, including written stipulations of facts, having been received and the Court having fully considered the same hereby makes the following special findings of fact:

I.

The plaintiff is a resident of the County of Los Angeles, State of California, and the jurisdiction of this Court is dependent upon a Federal question in that the cause of action arises under the laws of the United States of America pertaining to the Internal Revenue, to-wit: the Revenue Act of 1926.

II.

At the time of the collection from the plaintiff as [73] Executrix under the Will of the said W. O. Sampson, deceased, and the payments to the defendant of the Federal estate taxes hereinafter referred to, the defendant, Galen H. Welch, was the Collector of Internal Revenue in and for the Sixth Collection District of California, and maintained his office as such Collector in the City of Los Angeles, State of California. The said Galen H. Welch retired from his office as such Collector of Internal Revenue on or about the 30th day of June, 1933, and was not in office as such Collector at the time of the commencement of this action.

III.

This action is brought against the defendant as an officer of the United States of America acting under and by virtue of the Revenue Act of 1926, and on account of acts done by the defendant under color of said office and of the Revenue Laws of the United States.

IV.

Plaintiff and William O. Sampson were married in 1899 and established their residence in California in the year 1909. They lived together as husband and wife and resided in the State of California until Mr. Sampson's death on December 28, 1930. Mr. Sampson died on said last named date.

V.

On or about the 21st day of December, 1931, the plaintiff, as Executrix under the Will of W. O. Sampson, deceased, filed with the defendant, as Collector of Internal Revenue for the Sixth Collection District of California, a return for Federal estate taxes upon the estate of the said W. O. Sampson, deceased. The return so filed disclosed a net taxable estate of $237,136.21. Thereafter the Bureau of Internal Revenue audited the said tax return and made certain adjustments therein, claiming that the net estate subject to Federal estate taxes was $294,606.15, upon which the Bureau of Internal Revenue asserted a net estate tax of $2,316.16. [74] Between December 16, 1931, and December 28, 1932, the plaintiff, Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, paid to the

defendant, Galen H. Welch, as Collector of Internal Revenue for the Sixth Collection District of California, the following amounts upon account of said estate tax, said payments having been made upon the dates set opposite each amount:

Date of Payment	Amount Paid
December 16, 1931	$ 1,197.09
December 23, 1932	223.81
December 28, 1932	254.21
Total amount paid between said dates	$ 1,675.11

VI.

Prior to her husband's death, and on the 23rd day of May, 1929, a written agreement was made, executed and delivered between plaintiff and said William O. Sampson. The following is a true and correct copy of said agreement between the plaintiff and the said decedent, William O. Sampson:

This Agreement, made this 23rd day of May, 1929, between William O. Sampson, first party, and Mae Sampson, second party, both residing at Los Angeles, California,

Witnesseth: Whereas, the parties hereto intermarried on or about October 3, 1899, and since that time have been and now are husband and wife and living together as such; and

Whereas, said parties, since the date of their marriage have acquired certain property which, by virtue of the laws of the State of California and/or written agreement between the parties hereto, is the community property of the parties hereto; and the parties hereto are desirous that the rights and

interests of the re- [75] spective parties hereto in and to all their community property be expressly defined and established in accordance with the terms and provisions hereof;

Now Therefore, in consideration of the love and affection which each of the parties hereto bears unto the other and of other good and valuable consideration, moving from each of the parties unto the other, it is hereby agreed as follows:—

1. That all property now owned by the first party shall be and the same is hereby declared to be community property of the parties hereto.

2. That the respective interests of the parties hereto in their community property during the continuance of the marriage relation are and shall be present, existing and equal interests under the management and control of the husband, first party hereto, as is provided in Sections 172 and 172 (a) of the Civil Code of the State of California.

3. That this agreement is intended and shall be construed as defining the respective interests and rights of the parties hereto in and to all community property, and the rents, issues and profits thereof, heretofore or hereafter acquired by the parties hereto during the continuance of said marriage relation.

First party does hereby assign, transfer and convey unto second party such right, title and interest in and to said community property as may be necessary to carry into full force and effect the terms of this instrument.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first above written.

WILLIAM O. SAMPSON
MAE SAMPSON [76]

VII.

On or about the 24th day of November, 1933, the plaintiff filed with the Collector of Internal Revenue at Los Angeles, California, a written claim for refund of the Federal estate tax so assessed and collected by the defendant from the plaintiff as Executrix under the Will of W. O. Sampson, deceased. The basis of the claim for refund was that the Commissioner of Internal Revenue erroneously included in the gross taxable estate of W. O. Sampson, deceased, the interest in the property claimed to have been acquired by the plaintiff, Mae H. Sampson, under the terms and provisions of the said agreement dated May 23, 1929.

VIII.

Thereafter, to-wit, on or about the 13th day of July, 1934, the Commissioner of Internal Revenue, by his duly authorized deputy, in writing notified the plaintiff Mae H. Sampson, as Executrix under the Will of W. O. Sampson, deceased, that the said claim for refund so filed by her as aforesaid was rejected in its entirety.

IX.

That no part of the sums so paid by the plaintiff Mae H. Sampson, as Executrix of the estate of W.

O. Sampson, deceased, to the defendant as hereinbefore set forth has been paid, refunded or credited, and that there is no offset against the claim of the plaintiff herein for a refund of the same.

X.

No action upon the claim for refund hereinbefore referred to, other than as herein set forth, has been taken before Congress or before any of the Departments of the Government of the United States, and that no action has been brought upon said claim for refund except the present action.

XI.

The total gross estate upon which the United States [77] Bureau of Internal Revenue computed the estate tax upon the estate of W. O. Sampson was $493,109.15, which said value was fixed as of December 28, 1930, the date of the death of said W. O. Sampson. This amount is made up as follows:

Real Estate, all of which is situate in the State of California	$	32,842.46
Real estate, all of which is situate in the State of California, held in joint tenancy by the decedent and the plaintiff, Mae H. Sampson		35,532.88
Corporate Common and Preferred stocks evidenced by certificates		312,273.88
Corporate bonds payable to bearer with interest accrued to December 28, 1930		8,974.90
Unsecured negotiable promissory notes with accrued interest thereon and checks payable to W. O. Sampson		25,959.91
Life Insurance payable to the plaintiff, Mae H. Sampson	$	109,331.88
Less amount exempt under Section		

302(g) of the Revenue Act of 1926	40,000.00	
	69,331.88	
Salary (bonus) accrued at the date of decedent's death		6,213.24
Household furniture and automobile		1,980.00
Total Gross Estate		$493,109.15

The said sum of $493,109.15 includes the one-half interest in the property claimed by the plaintiff, Mae H. Sampson under and by virtue of the terms of the said alleged agreement dated May 23, 1929, hereinbefore referred to. The Bureau allowed deductions in the sum of $198,503, leaving a net taxable estate amounting to $294,606.15, upon which latter sum a total tax, after deducting a credit for California inheritance tax paid, in the sum of $2,316.16, was computed and assessed.

XII.

Of the property included in the gross estate by the Commissioner of Internal Revenue in computing such Federal estate tax, the following property acquired by decedent prior to July 29, 1927, was community or separate property at the time of its [78] acquisition; the community property having been acquired with funds earned by him before said date:

SEPARATE OR COMMUNITY PROPERTY ACQUIRED BEFORE JULY 29, 1927

Reported on Fed. Est. Tax Return		Asset	Date Acquired	How Acquired	Commissioner's Final Valuation
Schedule	Item				
A	1	Real Est. 901-3 E. 9th St., Los Angeles	5-1 -24	By Purch.	12,842.46
A	2	Real Est. 213 N. Norton Ave. Los Angeles	5-1923	By Purch.	20,000.00
B	1	3857.5 Shares—Bullock's	6-15-22	By Gift	92,580.00
B	1	7292.5 Shares—Bullock's	9-1925	By Purch.	175,020.00
B	21	100 Shares—Bullock's	6-16-22	By Gift	10,000.00
B	34	$100 L. A. Union Term. Bond	3-1924	By Purch.	110.50
B	35	$1000 Miller & Lux 7%	12-16-25	By Purch.	887.11
B	37	$2000 Oakmont Country Club, 6% Bond	3- 1-23	By Purch.	1,004.50
B	38	$1000 Pacific S.S. Co. 6½% Bond	1-30-25	By Purch.	350.00
B	39	$1000 Pacific Palisades Assn., 6½% Bond	3- 9-27	By Purch.	1,005.90
C	1	Note of John G. Bullock	5-11-27	By Purch.	12,883.33
"	2	Note of P. G. Winnett	5-11-27	By Purch.	12,883.33
"	16	Life Ins. Pol.—Penn Mutual Life Ins. Co. #1114796	5- 5-24	By Purch.	3,011.91

Separate or Community Property Acquired Before July 29, 1927—(Continued)

Reported on Fed. Est. Tax Return Schedule	Item	Asset	Date Acquired	How Acquired	Commissioner's Final Valuation
C	17	Life Ins. Pol.—Union Central Life Ins. Co. #745121	1-13-23	By Purch.	3,260.07
"	18	Life Ins. Pol.—Provident Mutual Life Ins. Co. #406,409	5- 4-22	By Purch.	5,347.87
C	19	Life Ins. Pol.—Provident Mutual Life Ins. Co. #424100	1-15-23	By Purch.	3,309.47
"	20	Life Ins. Pol.—Provident Mutual Life Ins. Co. #461463	5- 3-24	By Purch.	3,032.65
"	21	Life Ins. Pol.—Provident Mutual Life Ins. Co. #505528	11-17-25	By Purch.	2,204.82
"	24	Life Ins. Pol.—Provident Mutual Life Ins. Co. #276752	5- 4-17	By Purch.	6,898.42
D-2	1	Household Goods	Prior to 7-29-27	By Purch.	900.00
"	2	Household Goods	Prior to 7-29-27	By Purch.	80.00
		Bank Account—Omitted in Return, Added by Revenue Agent's Report		Community	46.57
					$367,658.91

All of the foregoing was community property except Items B-1 and B-21, which two latter items of Bullock's stock were the separate property of decedent acquired by gift, at the time of acquisition. [79]

The two parcels of real estate listed above were, at the time of their purchase, deeded to plaintiff's husband, W. O. Sampson, and continuously thereafter stood of record in his sole name until after his death. The bonds referred to above were payable to bearer and, at the time of their purchase, were delivered to plaintiff's said husband. Each of the two promissory notes referred to above was drawn to the sole order of plaintiff's said husband, and neither was endorsed by him during his lifetime. The life insurance items referred to above represent the proportions of the proceeds of each of the seven listed policies attributable to premiums earned and paid by plaintiff's said husband prior to July 29, 1927. These policies were all payable to plaintiff as beneficiary.

The certificates representing the two items of Bullock's stock (Items B-1 and B-21) were, at the time of their said acquisition, issued to, and in the sole name of, plaintiff's said husband and, continuously thereafter until a date subsequent to his death, stood in his sole name.

The last item above (D-2-2), consisting of cash in the sum of $46.57, was earned by decedent prior to July 29, 1927.

By said agreement of May 23, 1929, the parties

transferred all of the said community property of the parties and said husband's said separate property (described and referred to in this finding XII) into community property of the spouses of the type acquired by California married persons after July 29, 1927; and Mr. Sampson transferred to plaintiff such an interest in all such community and separate property as would have accrued to plaintiff under the community property laws of California, including the provisions of Section 161a of the California Civil Code, had such property been purchased with funds earned in California by the community after July 29, 1927. [80]

XIII.

Of the property included by the Commissioner in the gross estate in computing such tax, the following property was acquired by purchase by plaintiff's said husband before May 23, 1929, with funds earned by him after July 29, 1927:

	Property	Valuation
5	Shares Dilfer Bond & Mtg. Co., Common	$ 450.00
5	Shares Dilfer Bond & Mtg. Co., Common	450.00
10	Shares General Mills, No Par Common	461.25
15	Shares Pac. Amer. Fire Ins. Co., Common	375.00
20	Shares Van de Kamp's Holland-Dutch Bakers	600.00
200	Shares Bullock's, Inc. Pref.	20,000.00
5	Shares Van de Kamp's Holland-Dutch Bakers	425.00
$1000	Bullock's 6%, 1947 Gold Bonds	994.60
$1000	Chicago Great Western Ry., 4% Bond	658.11
$1000	Home Service Co., 6½% 1942 Bond	985.90
	Packard Motor Car	1,000.00
	Aggregate	$26,399.86

All of the certificates evidencing the shares of stock just listed were, at the time of their purchase, issued to and in the sole name of plaintiff's said husband and, continuously thereafter, stood in his sole name until after his death. The bonds just listed were payable to bearer and at the time of their acquisition were purchased by and delivered to plaintiff's said husband.

The above property listed in this Finding XIII was, at the time of its acquisition, community property of the spouses of the type acquired by California married persons after July 29, 1927. [81]

XIV.

Of the property included by the Commissioner in the gross estate in computing such tax, the following property was acquired by purchase by plaintiff's said husband before his death with funds earned by him after May 23, 1929, the date of execution of said agreement:

Property	Valuation
15 Shares America Safety Razor Corp., No par com.	$ 840.00
15 Shares Caterpillar Tractor Co., no par common	384.37
5 Shares Caterpillar Tractor Co., no par common	128.13
10 Shares Caterpillar Tractor Co., no par common	256.25
50 Shares Citizens Nat'l. Tr. & Sav. Bank, common	4,000.00
10 Shares Columbia Gas & Electric Co., common	327.50
2 Shares Columbia Oil & Gasoline Co., common	9.25
50 Shares Curtis Wright Corp., no par common	112.50
10 Shares General Foods Corp., no par common	472.25
12 Shares General Motors Corp., common	409.50

Property	Valuation
10 Shares Nat'l Dairy Prod. Corp. no par common	$ 373.75
25 Shares Packard Motor Corp., no par common	209.38
12 Shares Phillips Petroleum Co., no par common	156.00
12 Shares Taylor Milling Corp., no par common	234.00
20 Shares Union Oil Co. of Calif., common	422.50
10 Shares Van de Kamp's Holland Dutch Bakers, Inc.	300.00
10 Shares Walworth Co., no par common	112.25
10 Shares Commonwealth & Southern Corp.	905.00
10 Shares Wm. Filene's Sons Co., Pref.	905.00
12 Shares Gamewell Co.	730.00
15 Shares Grand Union Co., convertible preferred	540.00
1 Share Van de Kamp's Holland Dutch Bakers, Pref.	85.00
$1000 Caterpillar Tractor Co., 5%, 1935 Bond	962.22
	[82]
$1000 Nat'l. Dairy Prod. Co. 1948 Bond	1,008.12
$1000 Sinclair Cons. Oil Corp. 7% 1937 Bond	1,007.94
1930 Bonus—Bullock's	6,166.67
Aggregate of ten checks listed on Schedule C of Federal Estate Tax Return (plaintiff's Exhibit No. 2) being interest and dividends on the securities listed in this Finding	193.25
	$ 21,250.83

All of the certificates evidencing the shares of stock just listed were, at the time of their purchase, issued to and in the sole name of plaintiff's said husband, and, continuously thereafter, stood in his sole name until after his death. The three bonds just listed were payable to bearer and at the time of their acquisition were purchased by and delivered to plaintiff's said husband. The 1930 bonus item, just listed, was compensation paid for services rendered his employer in 1930 by plaintiff's

said husband. The above property listed in this Finding XIV was, at the time of its acquisition, community property of the spouses of the type acquired by California married persons with funds earned after July 29, 1927.

XV.

Of the property included by the Commissioner in the gross estate in computing such tax, the following was joint tenancy property of said spouses:

Property	Valuation
Real Estate 907-9 East 9th Street, Los Angeles	$ 18,000.00
Real Estate—4242-4242½ Normal Ave., Los Angeles	8,000.00
Real Estate—Lot 59, Tr. 1971, Los Angeles Co.	600.00
Bank Account—Citizens National Tr. & Sav. Bank	828.78
Bank Account—Citizens National Tr. & Sav. Bank	144.50
Bank Account—Citizens National Tr. & Sav. Bank	7,253.83
Fidelity Sav. & Loan Assn. Certificates	516.32
Savings Account—First National Bank of Los Angeles	189.45
Aggregate	$35,532.88

[83]

Each of the three parcels of joint tenancy real estate referred to above was acquired prior to July 29, 1927, with funds earned by decedent prior to said date. $828.78 of said bank account with Citizens National Trust and Savings Bank of Los Angeles represented funds earned and deposited by plaintiff's said husband prior to July 29, 1927. $144.50 thereof represented funds earned and deposited by plaintiff's said husband between July 29, 1927, and May 23, 1929. $7,253.83 thereof represented funds earned and deposited by plaintiff's said husband after May 23, 1929, and before his

death. The said Fidelity Savings and Loan Association certificate was purchased by plaintiff's said husband with funds earned by him after July 29, 1927. Said First National Bank savings account represented funds earned and deposited by plaintiff's said husband prior to January 1, 1924.

XVI.

Of the property included by the Commissioner in the gross estate in computing said tax, the following represents the proportions of the proceeds of life insurance policies attributable to premiums earned and paid by plaintiff's said husband after July 29, 1927:

Policies	Valuation
Penn. Mutual Life Ins. Co. #1114796	$ 2,027.70
Union Central Life Ins. Co. #745121	1,794.74
Provident Mutual Life Ins. Co. #406409	2,782.16
Provident Mutual Life Ins. Co. #424100	1,733.71
Provident Mutual Life Ins. Co. #461463	1,992.79
Provident Mutual Life Ins. Co. #505528	2,799.99
Provident Mutual Life Ins. Co. #577113	6,034.00
Provident Mutual Life Ins. Co. #582438	15,000.00
	[84]
Provident Mutual Life Ins. Co. #276752	3,101.58
New England Mutual Life Ins. Co. #614651	15,000.00
New England Mutual Life Ins. Co. #690423, Acquired 11-4-30	10,000.00
New England Mutual Life Ins. Co. #690424, Acquired 11-4-30	20,000.00
Aggregate	$82,266.67

The policies listed above were all payable to plaintiff individually as beneficiary.

XVII.

(a) The values of the items of property listed in the foregoing Findings XII to XVI, inclusive, are the gross values finally fixed by the Commissioner in computing the estate tax upon decedent's estate. The total gross values of said items amount to $533,109.15.

(b) In such final computation the Commissioner allowed the following exemptions and deductions as indicated in plaintiff's Exhibit No. 4 as follows:

Miscellaneous deductions	$ 98,503.00
Specific exemption	100,000.00
Life insurance exemption	40,000.00
Total	$238,503.00

XVIII.

At the time of making the agreement hereinbefore referred to, to-wit, on May 23, 1929, the decedent, W. O. Sampson, was in good health and at that time was Secretary and Treasurer of Bullock's. The decedent was actively engaged in business until November 15, 1930. He was taken ill on the 15th or 16th of November, 1930, and died of Lobar pneumonia on December 28, 1930. On November 4, 1930, the New England Mutual Life Insurance Company issued two policies of insurance upon the life of the decedent, one for $10,000.00 and the other for $20,000.00.

XIX.

The agreement dated May 23, 1929, was not made in contemplation of death. [85]

XX.

That this suit is brought under Section 24 of the judicial code as amended. The amount sought to be recovered is less than $10,000.00.

XXI.

Galen H. Welch, the defendant named in the original complaint in this cause, died on or about the 25th day of July, 1941, leaving a Last Will and Testament in writing.

XXII.

Said Last Will and Testament has been admitted to probate by the Superior Court of the State of California, in and for the County of Los Angeles.

XXIII.

Letters Testamentary upon the said Last Will and Testament of the said Galen H. Welch have been issued by said Superior Court to Josephine Welch Overton, the Executrix named in the said Will.

XXIV.

Said Josephine Welch Overton is now the duly appointed, qualified and acting Executrix of the Estate of said Galen H. Welch, deceased.

XXV.

Notice to creditors of the said Galen H. Welch was first published on August 29, 1941.

XXVI.

The plaintiff herein filed with the Clerk of said Superior Court her claim against said estate of

Galen H. Welch, deceased, in the sum of $1,429.90 for Federal Estate Taxes, which the plaintiff herein claims were erroneously and illegally levied, assessed and collected upon the estate of the said W. O. Sampson, deceased, by the said Galen H. Welch, acting in his capacity as a Collector of Internal Revenue; the said claim being the [86] identical claim which is the subject matter of this action; said claim was so filed on February 4, 1942.

XXVII.

Under date of March 29, 1942, the said Josephine Welch Overton, as Executrix of the Estate of said Galen H. Welch, deceased, rejected the said claim in writing.

XXVIII.

The said Josephine Welch Overton, as Executrix of the estate of said Galen H. Welch, deceased, has been substituted as defendant in this action in the place and stead of the said Galen H. Welch, deceased.

XXIX.

The Bureau of Internal Revenue declined and refused to recognize the validity of said agreement dated May 23, 1929, and the effect thereof and included in the gross estate of the decedent, W. O. Sampson, the one-half interest belonging to the plaintiff, Mae H. Sampson, and computed the estate tax upon the interest of both W. O. Sampson and Mae H. Sampson in the property.

XXX.

The plaintiff is now and has been since the 23rd day of January, 1931, the duly appointed, qualified and acting Executrix of the Estate of W. O. Sampson, deceased, the said W. O. Sampson, the husband of said plaintiff having died testate a resident of Los Angeles County, State of California. The plaintiff was appointed Executrix of said estate by the Superior Court of the State of California, in and for the County of Los Angeles. [87]

Supplement to Findings of Fact in Sampson v. Josephine Welch Overton—No. 7317—Law.

XXXI.

The allegations of Paragraphs I, II, III, IV, V, VI and VII of the complaint are true.

The allegations of Paragraph VIII of the complaint are true as modified by the recomputations on file.

The allegations of Paragraphs IX, X, XI and XII are true.

The allegations of the supplemental complaint are true. [88]

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court makes the following conclusions of law:

I.

The effect of the said agreement dated May 23, 1929, was to vest in the said Mae H. Sampson a present, existing, and equal interest in the prop-

erty of said W. O. Sampson as if the said property had been acquired from community earnings of the said W. O. Sampson earned subsequent to July 29, 1927.

II.

The interest in the property of the decedent and his wife, plaintiff herein, so acquired under the said agreement of May 23, 1929, was such as to require the exclusion from the gross estate of the decedent subject to Federal Estate tax of one-half of all the property owned by the decedent and his wife at the date of the decedent's death.

III.

The decedent's gross estate subject to Federal Estate tax was accordingly $266,554.57.

IV.

In determining the net estate for Federal Estate tax purposes the following deductions are allowable in their entirety as deductions from the value of the said gross estate:

Miscellaneous deductions as per plaintiff's Exhibit No. 4	$ 76,503.00
Widow's allowance	22,000.00
Life Insurance exemption	40,000.00
Specific exemption	100,000.00
Total deductions	$238,503.00

V.

The plaintiff is entitled to interest at the rate of six per cent (6%) per annum from the dates of payment of said Estate tax as follows: On the

sum of $1,197.09 from December 16, 1931; on the sum of $223.81 from December 23, 1932; on the sum [89] of $198.11 from December 28, 1932.

VI.

The said agreement dated May 23, 1929, was not made in contemplation of death.

VII.

The plaintiff, as Executrix of the estate of W. O. Sampson, deceased, is entitled to judgment against the defendant herein in accordance with the Court's determination of the issues herein, said judgment to be entered pursuant to Rule 11 of this Court.

Approved and adopted this 7th day of October, 1942, with an exception allowed to the defendant.

RALPH E. JENNEY,
United States District Court Judge.

Approved as to form as required by Rule 8.

.....
United States Attorney.

.....
Assistant United States Attorney.

[Endorsed]: Lodged Aug. 5, 1942.
[Endorsed]: Filed Oct. 7, 1942. [90]

In the District Court of the United States in and for the Southern District of California, Central Division.

At Law No. 7317-RJ

MAE H. SAMPSON, individually and as Executrix under the Will of W. O. Sampson, Deceased,

Plaintiff,

vs.

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, Deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Defendant.

JUDGMENT

The above entitled cause came on regularly for trial on the 14th day of December, 1936, before Hon. Albert Lee Stephens, Judge of the United States District Court for the Southern District of California, Central Division, sitting without a jury, a trial by jury having been expressly waived by written stipulation of the parties hereto, and the plaintiff appearing by her attorney, Frank Mergenthaler, Esq., and the defendant appearing by Peirson M. Hall, United States Attorney and E. H. Mitchell, Assistant United States Attorney; thereafter by stipulation of the parties, the said case was transferred to Hon. Ralph E. Jenney, Judge of the United States District Court for the Southern Dis-

trict of California, Central Division; thereafter by Minute Order of the Court made [91] May 18, 1938, the case was reopened for the limited purpose of taking evidence as to the date of the acquisition of certain stocks, bonds, household furniture, automobile and other personal property, and written stipulations of a portion of the evidence having been filed, and oral testimony and documentary evidence having been introduced; Galen H. Welch, the original defendant in this case, having died, Josephine Welch Overton as Executrix of the Estate of said Galen H. Welch was substituted in the place and stead of said Galen H. Welch and supplemental pleadings were filed setting up the appointment of said Josephine Welch Overton as such Executrix; and the case having been submitted for decision and the Court having filed herein its Findings of Fact and Conclusions of Law, whereby by reason of the law and the facts herein, it is

Ordered, Adjudged and Decreed that the plaintiff, Mae H. Sampson, individually, and as Executrix under the Will of W. O. Sampson, deceased, do have and recover of and from the defendant, Josephine Welch Overton, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California, the principal sum of $1,466.11, together with the sum of $634.02, being interest at the rate of 6% per annum on the sum of $987.88, from December 21, 1931, to date; together with the sum of $132.19, being interest at

the rate of 6% per annum on the sum of $223.81, from October 28, 1932, to date; together with the sum of $147.94, being interest at the rate of 6% per annum on the sum of $254.42, from December 23, 1932, to date; the aggregate of said principal and interest being $2,380.26; together with her costs of suit in the sum of $23.50.

Dated: Los Angeles, California, October 7th, 1942.

RALPH E. JENNEY,
United States District Judge.

[92]

Approved as to form under Rule 8 this 6th day of October, 1942.

LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

Judgment entered Oct. 7, 1942. Docketed, Oct. 7, 1942. C. O. Book 11, Page 575. Edmund L. Smith, Clerk, by L. B. Figg, Deputy.

[Endorsed]: Filed Oct. 7, 1942. [93]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL
(RULE 59a)

Comes now the defendant in the above-entitled action and moves that an order be entered herein granting her a new trial upon the following two issues only, to wit:

1st. Whether the 1929 gift by decedent to plaintiff of a California wife's new type community interest in his separate and old type community properties was intended to take effect in possession or enjoyment at or after his death, within the meaning of Section 302(c) of the Revenue Act of 1926; and

2d. Whether the enjoyment by the donee of such transferred interest was subject, at the time of the donor's death, to changes through the exercise by him, either [94] alone or in conjunction with the donee, of powers to alter, amend or revoke, within the meaning of Section 302(d) of the Revenue Act of 1926.

GROUNDS OF MOTION

This motion is made upon the following grounds:
Grounds Based on Section 302(c) of the Act.

A. That in and by the 1929 instrument of transfer the indefeasible passing of the gift was dependent upon contingencies which were terminable by the donor's death, for the following reasons, to wit:—

1. In and by such instrument of transfer the donor retained, for the remainder of his life, the

right to a possible return of the properties, to which the transferred interest attached, upon the prior death of the donee intestate.

2. In and by such instrument no exercisable rights or powers, except protective, no economic benefits, and no incidents or attributes of ownership, were then transferred to the donee in respect of the properties to which her interest attached; none thereof vested to any extent in the donee until the donor's death; none thereof fully vested in the donee until the determination in probate of the distributable residue of such properties and until the distribution thereof; and then such rights, powers, economic benefits and incidents of ownership vested in the donee in respect of such residue only.

3. In and by such instrument the donee's interest was so transferred to her that none of such interest and none of the properties to which it attached, or the income therefrom, could have become a part of her probate estate had she predeceased the donor intestate; and none of such interest, properties or income could ever have become subject [95] to execution for her debts or obligations either before or after her prior death, or during the harmonious marriage of the spouses.

In and by such instrument of transfer the donor retained, for the remainder of his life, the following rights and powers over and in respect of the properties to which the transferred interest attached, which rights and powers were full and exclusive, were exercisable by him in his unlimited discretion,

in the form and mode of an owner, and without liability or accountability to the donee:

4. To dispose of such personal properties for an adequate or inadequate consideration:

5. To contract and incur, without limitation as to amounts, personal debts and personal obligations upon the credit of such properties, both real and personal, and both corpus and income; to discharge his personal debts and obligations out of such personal properties, both corpus and income; by will, to effectively cause the discharge of such debts and obligations out of any such specific real or personal properties after his death; and by death, testate or intestate, to subject said properties to the discharge of such debts and obligations, to the expenses of administering his estate, and to a family allowance.

B. That in and by the 1929 instrument of transfer the donor retained, for the remainder of his life, the right to the exclusive possession and enjoyment of the properties to which the donee's interest attached, in that he therein and thereby retained, for the remainder of his life, the incidents and attributes of ownership and the following rights and powers in, to, over and in respect of such properties, which rights and powers were full and exclusive, were exercisable by him in his unlimited discretion, in the form and mode of an owner, and without liability or accountability to the donee. These retained rights and [96] powers were in addition to those set forth in Ground A above:

1. To manage and control all of such properties, both real and personal, together with all income therefrom:

2. To use, possess and enjoy such properties, together with the income and all other economic benefits arising therefrom.

3. To lease or rent such personal properties without limitation as to time, and to lease and rent such real properties for successive periods of one year and from month to month, without limitation, and to deliver possession and use thereof to the lessee or tenant.

C. That none of the foregoing rights, powers and economic benefits was relinquished in whole or in part by decedent prior to this death.

D. That the donor's death and the administration and distribution of his probate estate brought the gift into enjoyment by the donee for the first time, and then only in respect of the residue thereof.

Grounds based on section 302(d) of the act.

E. That in and by such instrument the donor retained continuously until the moment of his death the following freely exercisable powers to change the donee's enjoyment of the interest transferred to her, and to partially or completely divest her of her said interest in respect of all or a portion of the properties to which it attached.

Powers exercisable by Donee alone

1. The powers described in the foregoing Paragraphs A-4, 5 and 6, and B-1, 2 and 3;

2. The power to lose, break and demolish the tangible [97] personal properties and any improvements upon the real properties to which the donee's interest attached;

3. The power to waste, squander and speculate with and (short of a pure gift) to completely dissipate such personal properties, both tangible and intangible, as well as the income from both the real and personal properties.

The foregoing powers, numbered "1" through "3", above, were so exercisable by the donor alone, without the knowledge or consent of the donee, and without accountability or liability to her therefor;

Powers exercisable in Conjunction with Donee

4. With the consent of the donee, the power to make gifts of such properties, both real and personal; and

5. With the consent of the donee, the power to sell and mortgage such real properties, and to lease the same for periods longer than one year.

The exercise by the donor, in his lifetime, of any one or more of the foregoing powers referred to in Grounds E-1 through 5, above, would have lessened, augmented or otherwise altered and changed the donee's enjoyment of the interest transferred to her.

Powers to Divest Exercisable alone

The exercise by the donor, in his lifetime, of any one or more of the following retained powers would have completely divested the donee of her trans-

ferred interest in one or more or all of the properties to which it attached, to wit:

6. The power to sell the tangible personal properties and to dissipate the same and the income therefrom, either intentionally or untintentionally, by use, destruction, pledge and mortgage, and by payment of his personal debts and obligations therewith and with the proceeds of any [98] sale, mortgage or pledge thereof;

7. The power to sell both the tangible and intangible personal properties, and to dissipate the same and the income therefrom, either intentionally or unintentionally, by unsuccessful investment, speculation, pledge and mortgage and by the payment of his personal debts and obligations therewith and with the proceeds of any sale, mortgage or pledge thereof; and

8. The power to contract and incur personal debts and obligations amounting to a sum in excess of the value of all the properties to which the donee's interest attached, both real and personal, with resulting execution sales, bankruptcy or death insolvent.

This motion is made pursuant to Rule 59(a) of the Rules of Civil Procedure, and upon the pleadings, all stipulations of fact, the reporter's transcript, all exhibits, all briefs, all court orders, and the findings and conclusions, on file in this case, and upon the points and authorities hereto attached and made a part hereof.

Dated: October 16, 1942.

LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL
Attorneys for Defendant.

[Endorsed]: Filed Oct. 17, 1942. [99]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

The court has studied with both interest and profit the ably and carefully prepared brief of counsel for defendant. It is, however, the considered opinion of the court that this case is governed by the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of United States v. Goodyear, 99 F.2d 523. Any modification or limitation upon the rule of that case properly should be made only by that court or by the Supreme Court of the United States. Likewise, if the case at bar is to be distinguished, in principle, from the Goodyear case, that distinction should properly be pointed out only by that court or by the Supreme Court of the United States. It would seem an impertinence, after the decision of the Ninth Circuit in the Goodyear case, for this court to re-express any of its views previously indicated in Sampson v. Welch,

23 F.Supp. 271, or to attempt to distinguish, in principle, [100] the case at bar from the Goodyear case.

The motion for new trial, having been fully presented in the briefs and in oral argument, is denied.

It is so ordered.

Dated: November 17, 1942.

RALPH E. JENNEY,
United States District Judge.

[Endorsed]: Filed Nov. 17, 1942. [101]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Josephine Welch Overton, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 7th day of October, 1942.

Dated: February 16, 1943.

LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 16, 1943 and mailed copy to Frank Mergenthaler, Attorney for Appellee.[102]

[Title of District Court and Cause.]

ORDER AND STIPULATION RE RECORD ON APPEAL

Whereas, the defendant in the above-entitled action has taken an appeal from the judgment in this case to the United States Circuit Court of Appeals for the Ninth Circuit, and the record therein consists, among other things, of a number of written exhibits that were introduced in evidence by the plaintiff; and

Whereas, it is the desire of the parties hereto, in order to save the time, labor and expense of making photostatic copies thereof, to facilitate printing and to permit inspection by the appellate court of the originals, that said original documents be sent to the said court in lieu of copies;

Now, therefore, it is stipulated and agreed, by and between the parties, through their respective counsel undersigned, that the originals of plaintiff's ex-

hibits numbered 2, 3, 4, 5, 6, 7 and 8, inclusive, be sent to the appellate [103] court in lieu of copies.

Dated: May 11, 1943.

FRANK MERGENTHALER,
Attorney for Paintiff-Appellee.
LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant-Appellant.

It is so ordered this 11 day of May, 1943.

RALPH E. JENNEY,
Judge of the District Court.

[Endorsed]: Filed May 11, 1943. [104]

[Title of District Court and Cause.]

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

Whereas, the defendant in the above-entitled action has taken an appeal from the judgment in this case to the United States Circuit Court of Appeals for the Ninth Circuit, and has heretofore filed her Designation of Contents of Record on Appeal; and

Whereas, it is the desire of the parties hereto

to lessen the size of the record by eliminating certain portions thereof designated by defendant;

Now, therefore, it is hereby stipulated and agreed by and between the parties, through their respective counsel undersigned, that this stipulation shall supersede and take the place of said defendant's Designation heretofore filed.

It is further stipulated and agreed that the complete record and all of the proceedings and evidence in the above-entitled action be incorporated in the [105] record on appeal, including the following:—

1. Complaint.
2. Answer.
3. Stipulation waiving jury trial, dated September 15, 1936.
4. Entry of August 31, 1937, relating to the filing of Stipulation and Order Vacating Order of Submission and resubmitting the case of Judge Ralph E. Jenney on the same evidence and briefs.
5. The trial court's Minute Order of May 18, 1938.
6. Order vacating Original Opinion and directing that Findings and Conclusions be prepared by plaintiff's counsel, filed January 9, 1941.
7. Order dated and filed February 16, 1942, substituting Josephine Welch Overton, Executrix, as defendant in place of Galen H. Welch, deceased.
8. Supplemental Complaint filed May 9, 1942.
9. Answer thereto, filed June 10, 1942.
10. Defendant's Objections to form of Findings and Conclusions proposed by plaintiff, filed August

8, 1942 (omitting, however, any Points and Authorities attached thereto.)

11. Defendant's Notice of Motion for leave to file Amended Answer to original Complaint, filed September 5, 1942 (omitting, however, any Points and Authorities attached thereto).

12. Findings of Fact and Conclusions of Law, lodged August 5, 1942, and filed October 7, 1942.

13. Judgment dated and filed October 7, 1942.

14. Defendant's Motion for New Trial, filed October 17, 1942 (omitting, however, the Points and Authorities attached thereto).

15. Order denying defendant's Motion for New Trial, dated and filed November 17, 1942.

16. Plaintiff's Exhibit No. 1, the "Stipulation as to Facts".

17. Plaintiff's Exhibits 2, 3, 4, 5, 6, 7 and 8.

18. Supplemental Stipulation as to Facts, filed June 6, 1938. [106]

19. Second Supplemental Stipulation as to Facts, filed July 1, 1938.

20. Third Supplemental Stipulation as to Facts, filed September 6, 1938.

21. Reporter's Transcript of Proceedings of December 14, 1936.

22. Notice of Appeal, filed February 16, 1943.

23. Order of March 25, 1943, extending to May 15, 1943, appellant's time to file record and docket cause on appeal.

24. Order and Stipulation concerning use on appeal of original exhibits in lieu of copies thereof, dated May 11, 1943.

25. This Stipulation.

Dated: May 12th, 1943.

FRANK MERGENTHALER,
Attorney for Plaintiff-Appellee.
LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Defendant-Appellant.

[Endorsed]: Filed May 12, 1943. [107]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET APPEAL

Upon motion of defendant, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above-entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby extended to and including the 15th day of May, 1943.

Dated this 25th day of March, 1943.

RALPH E. JENNEY
United States District Judge.

[Endorsed]: Filed Mar. 26, 1943. [108]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 108, inclusive, contain full, true and correct copies of: Complaint, Refund of Federal Estate Taxes; Answer; Stipulation Waiving Trial by Jury; Stipulation as to Facts (Plaintiff's Exhibit No. 1); Minute Orders Entered August 31, 1937, and May 18, 1938, Respectively; Supplemental Stipulation as to Facts; Second Supplemental Stipulation as to Facts; Minute Order Entered January 9, 1941; Order of Substitution; Supplemental Complaint; Answer to Supplemental Complaint; Defendant's Objections to Form of Findings and Conclusions; Notice of Motion for Leave to File Amended Answer to Original Complaint; Minute Order Entered Sept. 28, 1942; Findings of Fact and Conclusions of Law; Judgment; Motion for New Trial; Order Denying Motion for New Trial; Notice of Appeal; Order and Stipulation re. Record on Appeal; Stipulation as to Contents of Record on Appeal and Order Extending time to Docket Appeal which together with Original Plaintiff's Exhibits Nos. 2 to 8, inclusive, and Original Reporter's Transcript transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 13th day of May, A. D. 1943.

[Seal] EDMUND L. SMITH
Clerk
By THEODORE HOCKE
Deputy Clerk.

[Title of District Court and Cause.]

TESTIMONY

Before Honorable Albert Lee Stephens

Appearances:

For the Plaintiff:

FRANK MERGENTHALER, Esq.

For the Defendants:

PEIRSON M. HALL,
United States Attorney; and
E. H. MITCHELL,
Assistant United States Attorney.

Los Angeles, California,
Monday, December 14, 1936;
2:15 p.m.

Mr. Mergenthaler: I would like to offer some documents in evidence, a stipulation which Mr. Mitchell has been good enough to sign.

Mr. Mitchell: For the purpose of the record, the defendant objects to the introduction of any evidence on the ground that the complaint does not state a cause of action.

The Court: Well, when are you going to present that question?

Mr. Mitchell: I would suggest we argue it upon the final submission.

The Court: And reserve a ruling until then?

Mr. Mitchell: Yes.

The Court: Very well.

The Clerk: Plaintiff's Exhibit No. 1.

(The stipulation referred to was received in evidence and marked "Plaintiff's Exhibit No. 1.")

Mr. Mergenthaler: I would like to offer in evidence, if the Court please, a photostat of a certified copy of the Federal Estate Tax Return, in the estate of W. O. Sampson, deceased.

The Clerk: Plaintiff's Exhibit No. 2. [2*]

(The photostat referred to was received in evidence and marked "Plaintiff's Exhibit No. 2.")

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* Page numbering appearing at top of page of original Reporter's Transcript.

PLAINTIFF'S EXHIBIT No. 2

Form 706
Treasury Department
Internal Revenue Service
Revised June, 1930

RETURN FOR FEDERAL ESTATE TAX

[Pencil Notations] : 5314—6th Calif Orig P.C.

(Not to Be Filed in by Taxpayer)

Time to file return extended by Commissioner to.....

Collection District.....Bureau File No.....

By Collector to.....

ASSESSMENTS OF RETURNED TAX

Amount	List	Page	Line
1,197.09	Dec. 31	302	0

PAYMENTS OF RETURNED TAX

Date	Principal	Interest
12-21-31	1,197.09	

Collector of Internal Revenue will stamp here date return filed.
[Stamped] : Received Dec. 21, 1931. Estate Tax Section, Internal Revenue 6th Cal. [Initialed] : S.

Tentative findings, $..... Deficiency determined, $.....

ASSESSMENTS OF DEFICIENCY IN TAX

Amount of deficiency, exclusive of interest	Interest on deficiency, from due date of tax to date of assessment	List	Page	Line
659.31	26.44	1st Suppl. Dec. 1934	102	1
459.76	18.47	4th Suppl. Dec. 1932	101	4

PAYMENTS OF DEFICIENCY IN TAX

Date	Amount of deficiency, exclusive of interest	Interest assessed on deficiency from due date to date of assessment	All other interest	Adjustments
.....	.....	.....	.....	.....
.....	.....	.....	.....	.....

[Initialed] : CS

Mae H. Sampson

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Plaintiff's Exhibit No. 2—(Continued)

An Itemized Inventory by Schedules of the Gross Estate of the Decedent, with Legal Deductions, to Be Filed in Duplicate

Decedent's name William Orlando Sampson

Date of death December 28, 1930.

Residence at time of death #213 No. Norton Ave., Los Angeles, California.

General Instructions—Read with Care

1. The return is required for the estate of every resident decedent who died after the effective date of the Revenue Act of 1926 and the value of whose gross estate at the date of death exceeded $100,000; for the estate of every resident decedent who died prior to such date and subsequent to September 8, 1916, whose gross estate exceeded $50,000; and for the estate of every nonresident decedent any part of whose gross estate was at the date of death situated (within the meaning of the statute) in the United States. The term "United States" means only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

2. The return is due one year after the date of death. The Return for a Resident Decedent should be filed with the collector of the district in which such decedent was domiciled at the time of death. The Return for a Nonresident Decedent should be filed with the United States Collector of Internal Revenue of the district in which the gross estate was situated, or, if situated within more than one district, or if the gross estate consisted wholly of stock

Plaintiff's Exhibit No. 2—(Continued)

in a domestic corporation, then with the Collector of Internal Revenue for the Second New York District, New York, N. Y., or with such other collector as the Commissioner may designate.

3. Remittance in payment of the tax should be made payable to "Collector of Internal Revenue at .....," naming city in which is located the office of the collector with whom the return is filed.

4. Before the return is prepared, Regulations 70, 1929 Edition, and any amendments thereto, should be carefully studied. The instructions given with respect to the individual schedules apply to the estates of decedents dying after the enactment of the Revenue Act of 1926, except such instructions as clearly refer to decedents who died prior to that date. If the decedent died prior to 10.25 a.m., Washington, D. C., time, February 26, 1926, this form is to be used but reference should be made to Article 110 of the regulations for a statement of the applicable rules.

5. All papers used in preparing the return should be carefully preserved for reference or inspection, as each estate tax return is verified by an Internal Revenue officer before the tax is determined by the Bureau.

6. If the decedent was a resident and left a will, two copies thereof, one of them certified, must be filed with the return. In the case of the estate of a Nonresident, there should be filed with the return—

(a) A certified copy of the will, if decedent died testate, or of each will, if decedent left

Plaintiff's Exhibit No. 2—(Continued)

more than one to govern in different jurisdictions.

(b) A certified copy of inventory of the complete gross estate, whether situated within or without the United States, if any deductions are claimed. In such case separate schedules should be made for property within and without the United States.

(c) A certified copy of schedule of debts and expenses allowed, if deduction on account thereof is claimed. If certified copy of inventory of all property outside the United States is filed with the return, such property need not be entered under the respective schedules of the return. See Article 52, Regulations 70, 1929 Edition.

7. This form consists of cover sheets, general information sheet, and sixteen schedules. Care should be taken to see that the return is complete and that all schedules are included in the proper order.

In the estate of a resident the various items comprising the gross estate must be set forth upon the schedules provided.

[Written] a1

[Page 2]

8. The questions asked under each schedule should be specifically answered, and if the decedent owned no property of any class specified under the schedule, the word "None" should be written across the schedule. If deduction under Section 303(a)(2) or Section 303(b)(2) is claimed, Schedule G-1 should be

Plaintiff's Exhibit No. 2—(Continued)

completed before the schedules which precede it are prepared.

9. If there is not sufficient space for all entries under any schedule, use additional sheets of the same size, numbering them consecutively, and insert them in the proper order in the return.

10. The return should be prepared in accordance with articles 12 and 65 of Regulations 70, 1929 Edition. Instructions will be found under each schedule. If instructions are carefully observed, it will greatly assist the estate and the Bureau in the final determination of the tax liability.

11. Penalties.—For penalties for failure to file return when due, keep records, and supply information, or for the preparation or presentation or the aiding or assisting in the preparation or presentation of a false or fraudulent return, affidavit, claim, or document, see Sections 320, 1103, 1114 of the Revenue Act of 1926. Reference is also made to Section 616 of the Revenue Act of 1928.

General Information Sheet

The information called for on this page is necessary for purposes of record and verification. Fill out all blanks carefully and completely.

The names of the decedent's legal heirs and next of kin, or if decedent left a will, the names of the beneficiaries thereunder, are required to be stated.

Plaintiff's Exhibit No. 2—(Continued)

If there are more than ten, only the names of the ten principal ones are required.

Did decedent die testate? (Answer "Yes" or "No.") Yes. If testate, two copies, one of them certified, of the last will must be filed with the return, unless the decedent was a nonresident, in which case but one copy, certified, is required.

Permanent residence at time of death #213 No. Norton Ave., Los Angeles, Calif.

Actual place of death City of Los Angeles, California, Age at death 58.

Cause of death Lobar Pneumonia.

How long ill Six weeks.

Business or employment Secretary & Treasurer of Bullock's, Inc.,

Business address 7th & Broadway, Los Angeles, California.

Was decedent married or single at date of death? Married Widow? _____ Widower? No.

State number of children, if any —Four (4)—

HEIRS, NEXT OF KIN, DEVISEES AND LEGATEES

Name	Relationship	Address
Mae H. Sampson	Widow	213 No. Norton Av. L.A. Calif.
Wilma Maud Pritchett	Daughter	" " " "
Ruth Anna Dollar	Daughter	" " " "
Ralph Herrick Sampson	Son	" " " "
Clement Griffith Sampson	Son	" " " "

Names of decedent's physicians:

Charles A. Warmer

Plaintiff's Exhibit No. 2—(Continued)

Address:

412 W. 6th St., Los Angeles, Calif.

Names of physicians and nurses who attended decedent during last illness:

Dr. Charles A. Warmer

Address

412 W. 6th St., Los Angeles, Calif.,

Dr. Robt. W. Langley

1052 W. 6th St., Los Angeles, Calif.

Mary Haneld, Nurse

4600 Kingswell Ave., L. A., Calif.

G. L. Schuckert, Nurse

1310¼ No. Virgil Ave., L. A. Calif.

(If more space is needed, insert additional sheets of same size)

[Written] a2

WILL

I, William Orlando Sampson, a resident of the City of Los Angeles, County of Los Angeles, State of California, being of the age of forty-six years, do make, publish and declare this my Last Will and Testament, hereby revoking all former wills by me at any time made.

First: I give, bequeath and devise to my beloved wife, Mae Sampson, all of my property of every kind and nature whatsoever and wheresoever situated.

Second: I make no provision for our children,

Plaintiff's Exhibit No. 2—(Continued)

Wilma Maud Sampson, Ruth Anna Sampson, Ralph Herrick Sampson and Clement Griffith Sampson, but leave the care and maintenance of said children to my said wife.

Third: I hereby nominate and appoint my said wife, Mae Sampson, executrix of this my Last Will and Testament, and request that she shall not be required to give any bond for the faithful performance of her duties as such executrix. And I hereby authorize my said executrix to sell, lease or otherwise dispose of all or any part of my said estate without the order of any Court, at either public or private sale, with or without notice, and for such consideration and upon such terms as my said executrix may see fit.

In Witness Whereof, I have hereunto signed my name at Los Angeles, California, on this 9th day of November, 1918.

WILLIAM ORLANDO SAMPSON

The foregoing instrument was, at the date hereof, by the said William Orlando Sampson signed and published as, and declared to be, his Last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses hereto.

W. W. MILLER
residing at 1943 So. Arlington St., Los Angeles

W. E. GOODHUE
residing at 319 No. Jackson St., Glendale, Calif.

Plaintiff's Exhibit No. 2—(Continued)

Received Dec 21 1931 Estate Tax Section Internal Revenue 6th Cal.

The foregoing instrument is a correct copy of the original as the same appears of record.

Attest December 18 1931

[Seal] L. E. LAMPTON
(Illegible) The Superior
(Illegible) County of Los
Angeles, California
By L J MILLER
Deputy

[Endorsed] No. 116257 Last Will and Testament of William Orlando Sampson Filed Jan. 5, 1931 L. E. Lampton, County Clerk By J R. Sweesy Deputy

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[Page 3]

GROSS ESTATE

SCHEDULE A

Real Estate

Instructions

Property which ordinarily would be listed under this schedule or under Schedules B to F, inclusive, is to be listed under Schedule G-1 if it is the basis of a claim for deduction under Schedule G-2. Reference is made to pages 15 and 16.

Real estate, improved or unimproved, should be so described and identified that upon investigation by an Internal Revenue officer, it may be readily located for inspection and valuation. For each parcel

Plaintiff's Exhibit No. 2—(Continued)
Schedule A—(Continued)

of real estate there should be given the area and, if the parcel is improved, a short statement of the character of the improvements. For location, such details as the following may be necessary:

City or Town Property.—Street and number, ward, subdivision, block and lot, etc.

Rural Property.—Township, range, block and lot, street, landmarks, etc.

If any item of real estate is subject to mortgage, the unpaid balance of the mortgage should be shown below under "Description." The full value of the property and not the equity must be extended in the value column. The mortgage should be deducted under Schedule J of this return.

Real property which the decedent has contracted to purchase should be listed in this schedule. The full value of the property and not the equity must be extended in the value column. The unpaid portion of the purchase price should be deducted under Schedule I of this return.

The value of dower, curtesy, or a statutory estate created in lieu thereof, is taxable, and no reduction on account thereof or on account of homestead or other exemptions should be made in returning the value of the real estate.

All rents accrued and unpaid should be apportioned to the date of death, whether due at that time or not.

Plaintiff's Exhibit No. 2—(Continued)

Schedule A—(Continued)

For further instructions see article 2 and articles 10 to 13, inclusive, Regulations No. 70, 1929 Edition.

Did the decedent, at the time of death, own any real estate? (Answer "Yes" or "No.") Yes.

Item No.	Description	Assessed Value for year of Decedent's Death	Fair Market Value at Date of Decedent's Death	Rents Accrued to date of Death
1	Situate in the City and County of Los Angeles, State of California, described as follows:— That portion of Lot 12 of the Stanford Avenue Tract as per map recorded in Book 55, Page 86, of Miscellaneous Records of said County, described as follows:— Beginning at the Southwest Corner of said Lot 12, thence Southeasterly along the line of 9th Street 36.825 feet; thence Northerly in a direct line to a point in the North line of said Lot 12, 13.2825 feet westerly from the Northeast corner thereof, thence Westerly 34.5675 feet along the Northerly line of said Lot 12 to the Northwest corner thereof; thence Southerly along the Westerly line of said Lot, 100 feet to the place of beginning, being Nos. 901-903 East Ninth Street, Los Angeles, California	$5,710.	12,600.	242.46

(This Schedule continued on following page)

Totals of Schedule A continued	9,540.	20,000.	0
Totals		$32,600.	$ 242.46
Grand Total			$32,842.46

Plaintiff's Exhibit No. 2—(Continued)

Schedule A—(Continued)

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

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Schedule A—Continued

Real Estate

Item No.	Description	Assessed Value for year of Decedent's Death	Fair Market Value at Date of Decedent's Death	Rents Accrued to date of Death
2	Situate in the City and County of Los Angeles, State of California, described as follows:— Lot 91 of Tract 499, as per Map recorded in Book 18, Page 105 of Maps, Records of Los Angeles County, being No. 213 North Norton Ave., Los Angeles, California,	$9,540.	20,000.	0
3	Holding Association filing on 40 acres of oil land in Wyoming, near Cody,		0	
	Amounts carried forward	$9,540.	$20,000.	0

Estate of William Orlando Sampson, Deceased. Date of Death Dec. 28, 1930.

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Plaintiff's Exhibit No. 2—(Continued)

[Page 4]

SCHEDULE B

Stocks and Bonds

Instructions

Give a complete description of all securities.

Stocks.—State the number of shares, whether common or preferred, and if preferred, what issue thereof, par value.

Stocks.—State the number of shares, common or preferred, par value, and quotation at which returned, exact title of corporation, and, if the stock is unlisted, the location of the principal business office. If a listed security, state principal exchange upon which sold.

Examples: 10 shares Public Service Corporation of New Jersey, 8 per cent cumulative preferred, par $100, at 125, New York Exchange.

10 shares Public Service Corporation of New Jersey, 7 per cent cumulative preferred, par $100, at 108¾, New York Exchange.

10 shares Public Service Corporation of New Jersey, 6 per cent cumulative preferred, par $100, at 99½, New York Exchange.

10 shares Eagle Manufacturing Co., Red Bank, N. J., unlisted, common, par $25, at 30, per Exhibit A, incorporated in New Jersey.

Bonds.—State quantity and denomination, exact title, kind of bond, interest rate, interest and due dates. State the exchange upon which listed if unlisted, the principal business office of the company.

Example: Ten $1,000 Baltimore & Ohio Railway Co. first mortgage 4 per cent registered 50-year gold

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

bonds, due 1948, January, April, July, and October, at 96, New York Exchange.

Valuation.—The value as of the date of death should be returned. This value can in general be found by the application of the rules stated below. If as to any security, it is contended that the application of these rules would not give such value, the evidence upon which the contention is based should be filed with the return.

Listed stocks and bonds should be returned at the mean between the highest and lowest quoted selling price upon the date of death, or if there were no sales on day of death, then at the mean between the highest and lowest sales on the nearest date thereto, if within a reasonable period. If death occurred on a Sunday or other holiday, quotations of the nearest previous day should be used; if listed on several exchanges, quotations of the principal exchange should be employed.

If actual sales are not available and the stock is quoted on a bid and asked basis, the bid as of date of death should be taken.

Unlisted securities which are dealt in actively by brokers or have an active market should be returned at the sale price as of the date of death or the nearest date thereto, if within a reasonable period either before or after death. Only sales in the normal course of business should be employed. Where no such sale occurred the nearest bid should be used,

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

if within a reasonable period either before or after death.

Inactive stock and stock in close corporations should be valued upon the basis of the company's net worth, earning and dividend paying capacity, general market conditions, and special conditions affecting the particular company, its future prospects, and all other factors having a bearing upon the value of the stock. The financial and other data upon which the estate bases its valuation should be submitted with the return.

Securities returned as of no value, nominal value, or obsolete, should be listed last, and the address of the company and the State and date of incorporation should be stated. Correspondence or statements used as the basis for return at no value should be retained for inspection.

Interest on bonds should be apportioned to the date of death and returned in the interest column. Dividends upon stock declared prior to death, and payable after date of death, must be returned separately in the interest column unless reflected in the price at which the stock is returned.

In estates of nonresidents there should be listed in this schedule all stocks and bonds physically in the United States at date of death (as to meaning of the term "United States" see paragraph numbered "1" on the first page of this form), and the actual depository on that date should be shown. In such estates there should also be listed in this schedule

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

the stocks of all corporations and associations created or organized in the United States. The foregoing requirements of this paragraph should be complied with, even though an inventory of the entire gross estate wherever situated is filed with the return.

Paragraph 3 of article 13, and article 12, Regulations No. 70, 1929 Edition, should be carefully reviewed before preparing this schedule.

Did the decedent, at the time of death, own any stocks or bonds? (Answer "Yes" or "No.") Yes.

If a resident decedent owned any stocks or bonds at the date of his death, they should be entered on pages 5 and 6. If the decedent was a nonresident, there should be entered on pages 5 and 6 such stocks and bonds subject to tax as above indicated.

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(Page 5)

Schedule B—Continued
Instructions

For detailed instructions regarding the method of valuing stocks and bonds, see the preceding page.

Item No.	Description	Fair market value at date of death	Interest or dividends
	Common Stocks		
1	11,150 shares Bullock's, Inc. no par	$223,000.00	
2	15 shares American Safety Razor Corporation, no par	825.00	
3	30 shares Caterpillar Tractor Company no par	746.25	
4	50 Citizens National Trust & Savings Bank shares $1,000 par value	4,000.00	
5	10 shares Columbia Gas & Electric Co. no par	318.75	
6	2 shares Columbia Oil & Gasoline Co. no par	9.25	

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

Item No.	Description	Fair market value at date of death	Interest or dividends
7	10 shares Credit Finance Corporation, $1,000 par value..	No Value	
8	50 shares Curtis Wright Corporation, no par.....	106.25	
9	10 shares Dilfer Bond & Mortgage Co., par value $1,000.00	900.00	
10	10 shares General Foods Corporation, no par	467.50	
11	10 shares General Mills, Inc. no par	450.00	
12	12 shares General Motors Corporation, par value $120.....	409.50	
13	10 shares National Dairy Products Corporation, no par....	365.00	
14	15 shares Pacific American Fire Insuranee, Company, par value $150.00	375.00	
15	25 Packard Motor Car Co., no par	203.13	
16	12 shares Phillips Petroleum Co. no par	151.50	
17	12 shares Taylor Milling Corporation, no par.....	234.00	
18	20 shares Union Oil Company of California, par value $500	420.00	
19	30 shares Van de Kamp's Holland-Dutch Bakers, Inc., no par	750.00	
20	10 shares Walworth Company, no par	106.25	

(See next page for Preferred Stocks)

Totals	$233,837.38	
Grand Total		$233,837.38
Amounts carried forward		$233,837.38

(Continued on page 6)

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

Estate of William Orlando Sampson, Date of death December 28, 1930.

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(Page 6)

Instructions

For detailed instructions regarding the method of valuing stocks and bonds, see page 4.

Item No.	Description	Fair market value at date of death	Interest or dividends
	Amounts brought forward	$233,837.38	$
	Preferred Stocks		
21	300 shares Bullock's, Inc. 7%, par value $30,000.00	27,000.00	
22	10 shares Commonwealth & Southern Corp, no par	875.00	
23	10 Credit Finance Corporation shares, par value $1,000.00	No value	
24	10 shares Wm. Filene's Sons Co. 6½%, par value $1,000.00	900.00	
25	12 shares Gamewell Co.	637.50	
26	15 shares Grand Union Co., convertible, $3.00, no par	540.00	
27	100 shares New Dominion Copper Co., Class A, 8% cumulative, par value $100.00	No value	
28	80 shares Pan-Pacific Consolidated Oil Co.	No value	
29	6 shares Van de Kamp's Holland-Dutch Bakers, Inc., $6.50 cumulative, no par	510.00	
	Bonds		
30	Bullock's, Inc. 6%, 1947 secured Sinking Fund Gold Bonds, par value $1000.00	980.00	14.60
31	Caterpillar Tractor Co. 5%, 1935, par value $1,000.00	960.00	12.22
32	Chicago Great Western Railway, 4%, 1959, par value $1,000.00	630.00	13.11

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)

Item No.	Description	Fair market value at date of death	Interest or dividends
33	Home Service Company, 6½%, 1942, par value $1,000.00	$ 880	$ 15.90
34	Los Angeles Union Terminal Co. 6%, 1941, par value $100.00	101.00	9.50
35	Miller & Lux, 7%, 1935, par value $1000.00	900.00	17.11
36	National Dairy Products Co. 5¼%, 1948, par value $1000.00	980.00	21.87
	(Bonds Continued on Next Page)		
	Totals	$269,730.88	$ 104.31
	Grand Total		$269,835.19
	Amounts carried forward	$269,730.88	$ 104.31

(Continued on page 7)

Estate of William Orlando Sampson, Date of death December 28, 1930.

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(Page 7)

Schedule B—Continued

(For Instructions See Page 4)

Instructions

	Amounts brought forward	$269,730.88	$ 104.31
	Bonds (Continued)		
37	Oakmont Country Club, 6%, 1932, par value $2,000.00	1,000.00	4.50
38	Pacific Steamship Co., 6½%, 1940, par value $1,000.00	350.00	Default
39	Pacific Palisades Assn., 6½%, 1938, par value $1,000.00	990.00	15.90
40	Sinclair Consolidated Oil Corporation, 7%, 1937, par value $1,000.00	970.00	22.94
	Totals	$273,040.88	$ 147.65
	Grand Total		$273,188.53

Plaintiff's Exhibit No. 2—(Continued)
Schedule B—(Continued)
(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

B A9

(Page 8)

SCHEDULE C

Mortgages, Notes, Cash, and Insurance Instructions

The five classes of property on this schedule should be listed separately in the order given.

Mortgages—State (1) face value and unpaid balance, (2)) date of mortgage, (3) date of maturity, (4) name of maker, (5) property mortgaged, (6) interest dates and rate of interest, and (7) amount of unpaid interest. For example: Bond and mortgage for $5,000, unpaid balance $4,000; dated January 1, 1923, John Doe to Richard Roe; premises 22 Clinton St., Newark, N. J., due January 1, 1933; interest payable at 6 per cent per annum January 1 and July 1; interest paid to January 1, 1927; unpaid interest $30. Reference is made to article 13 (5) of Regulations 70, 1929 Edition.

Notes, Promissory.—Give similar data.

Contract by the Decedent to Sell Land.—Give name of vendee, date of contract, description of property, sale price, initial payment, amounts of installment payments, unpaid balance of principal and accrued interest, interest rate, and date prior

Plaintiff's Exhibit No. 2—(Continued)
Schedule C—(Continued)

to decedent's death to which interest had been paid.

Cash in Possession.—List separately from bank deposits.

Cash in Bank.—Name bank and address, amount in each bank, serial number and nature of account, stating whether checking, savings, time deposit, etc. Include accrued interest in income column, or indicate if included in total on deposit. If statements are obtained from banks they should be retained for inspection by an internal-revenue agent. Reference is made to article 13 (6) of Regulations 70, 1929 Edition.

Insurance.—Include all insurance taken out by the decedent upon his own life as follows: (a) All insurance receivable by or for the benefit of the estate; (b) all other insurance to the extent that it exceeds in the aggregate $40,000 if the insured retained the right to change the beneficiary or if the insurance was taken out, or the beneficiary receiving the proceeds was named, after the enactment of the Revenue Act of 1918. Insurance payable to the estate must be returned first. State (1) name of company, (2) number of policy, (3) name of beneficiary. Include full amount receivable. If there is insurance payable to beneficiaries other than the estate, deduction may be taken at bottom of this page equal to the amount returned for such insurance, but not exceeding $40,000. For further instructions see articles 25 to 28, inclusive, Regulations No. 70, 1929 Edition.

Plaintiff's Exhibit No. 2—(Continued)
Schedule C—(Continued)

If Decedent Was a Nonresident, and died subsequent to 3.55 p. m. November 23, 1921, Washington, D. C., time, insurance on his life need not be included as a part of his gross estate.

Accounts in banks situated in the United States should be included if decedent died subsequent to said date and was engaged in or doing business in the United States at death. Report fully all facts concerning any account not included.

(1) Did the decedent, at the time of his death, own any mortgages, notes, or cash? (Answer "Yes" or "No")—Yes.

(2) Was any insurance on life of decedent receivable by his estate? (Answer "Yes" or "No.")—No.

(3) Was any insurance on life of decedent receivable by beneficiaries other than the estate? (Answer "Yes" or "No")—Yes.

Item No.	Description	Fair market value at date of death	Income or interest accrued to date of death
		$	$
	See annexed Schedule C.		
	Total	$134,532.38	
	Less amount of insurance receivable by beneficiaries, other than the estate, not in excess of $40,000	$ 40,000.00	
	Totals	$ 94,532.38	$ 94,532.38?
	Grand Total		$ 94,532.38?

(If more space is needed, insert additional sheet of same size)

Plaintiff's Exhibit No. 2—(Continued)
Schedule C—(Continued)

Estate of William Orlando Sampson, Date of death December 28, 1930.

C			A11
Item No.	Description	Fair market value at date of death	Income or interest accrued to date of death
	Notes		
1	Note of John G. Bullock, dated 6/24/30, for $12,500.00	$ 12,500.00	
2	Note of P. G. Winnett, dated 6/24/30 for $12,500.00	12,500.00	
3	Note of A. D. and Faith L. Sampson, to W. O. Sampson, dated April 11, 1924, due one year after date, for $100.00	—	—
	Checks		
4	Caterpillar Tractor Co. dated Nov. 25, 1930, for $10.00	10.00	
5	American Safety Razor Co. dated Dec. 31, 1930 for $18.75	18.75	
6	American Auto Insurance Co. dated Dec. 20, 1930, for $7.25	7.25	
7	E. A. Downey, for $35.00	35.00	
8	The Commonwealth & Southern Corporation for $15.00	15.00	
9	Wm. Filene's Sons Co. for $16.25	16.25	
10	National Dairy Products Corporation, for $6.50	6.50	
11	Phillips Petroleum Co. for $6.00	6.00	
12	Van de Kamp's Holland Dutch Bakers, Inc. for $9.75	9.75	
13	Van de Kamp's Holland Dutch Bakers, Inc. for $11.25	11.25	

Plaintiff's Exhibit No. 2—(Continued)
Schedule C—(Continued)

14	Taylor Milling Corporation for $7.50	7.50	
15	Citizens National Trust & Savings Bank, for $50.00	50.00	

Life Insurance Policies
Mae Sampson, Beneficiary

	Policy No.		
16	1114796, Penn. Mutual Life Ins. Co.	5,039.61	
17	74521, Union Central Life Ins. Co.	5,054.81	
18	406,409 Provident Mutual Life Ins. Co.	8,130.03	
19	424100, Provident Mutual Life Ins. Co.	5,043.18	
20	461463, Provident Mutual Life Ins. Co.	5,025.44	
21	505528, Provident Mutual Life Ins. Co.	5,004.81	
22	577113, Provident Mutual Life Ins. Co.	6,034.00	
23	582438, Provident Mutual Life Ins. Co.	15,000.00	39,331.88
24	276752, Provident Mutual Life Ins. Co.	10,000.00	70,000.
25	690,423 New England Mutual Life Ins. Co.	10,000.00 *	109,331.88
26	614651, New England Mutual Life Ins. Co.	15,000.00	40
27	690424, New England Mutual Life Ins. Co.	20,000.00	69,331.88
	(Total Amount of Life Insurance being $109,331.88)		
	Total	$134,532.38?	

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*Pencil notations in margin.

Plaintiff's Exhibit No. 2—(Continued)

(Page 9)

SCHEDULE D-1

Jointly Owned Property

Instructions

All property of whatever kind or character, whether real estate, personal property, bank accounts, etc., in which the decedent held at the time of his death an interest either as a joint tenant or as a tenent by the entirety, must be returned under this schedule.

The full value of the property must be included in the fourth column, unless it can be shown that a part of the property originally belonged to the other tenant or tenents and was never received or acquired by the other tenant or tenants from the decedent for less than a fair consideration in money or money's worth. (See section 302 (e) of act approved Feb. 26, 1926, and articles 22 and 23, Regulations No. 70, 1929 Edition.)

Where it is shown that the property or any part thereof, or any part of the consideration with which the property was purchased, was acquired by the other tenant or tenants from the decedent for less than an adequate and full consideration in money or money's worth, there should be omitted from this schedule only so much of the value of the property as is proportionate to the consideration furnished by such other tenant or tenants.

Where the property was acquired by gift, bequest, devise, or inheritance by the decedent and spouse as tenants by the entirety, then only one-half of

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-1—(Continued)

the value of the property should be listed on this schedule. Where the property was acquired by the decedent and another person or persons by gift, bequest, devise, or inheritance as joint tenants, and their interests are not otherwise specified or fixed by law, then there should be entered on this schedule only such fractional part of the value of the property as is obtained by dividing the full value of the property by the number of joint tenants.

If the executor contends that less than the value of the entire property is includable in the gross estate for purposes of the tax, the burden is upon him to show his right to include such lesser value, and in such case he should make proof of the extent, origin, and nature of the decedent's interest and the interest of decedent's cotenant or cotenants.

If the property consists of real estate, the assessed value thereof for the year of death should be shown in the second column, headed "Description of property." In the third column should be entered the fair market value of the whole property, even though only a fractional part thereof is returnable in column 4. In the fourth column should be entered the amount to be included in the gross estate pursuant to the instructions given above. In the fifth column should be entered the rents, interest, and other income accrued to the date of decedent's death in the same proportion as the amount entered in column 4 bears to the amount entered in column 3.

Property in which the decedent held an interest

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-1—(Continued)

as a tenant in common should not be listed here, but the value of his interest therein should be returned under Schedule A, if real estate, or if personal property, under the appropriate schedule. The value of the decedent's interest in partnerships should not be included here, but under Schedule D-2, on the following page, designated as "Other Miscellaneous Property."

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
		$.....	$.....	$.....
	(See page inserted following this Page)			
	Totals		$35,532.88	
	Grand Total			$35,532.88

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Samspon, Date of death December 28, 1930.

D-1 A12

Schedule D-1

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
	Real Estate			
1	Parcel 1: That portion of Lots 13 and 14 of the Stanford Avenue Tract, as per Map recorded in Book 55, Page 86, Misc. Records of said County, described as follows: Commencing at a point in the North line of			

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-1—(Continued)

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
	9th Street, distant 11.825 feet East from the South East corner of Lot 13; thence West along the North line of said 9th St. 36.825 feet; thence North parallel with the East line of said Lot 13 to the North line thereof; thence East along the North line of said Lots 13 and 14, 34 feet more or less to a point 9.348 feet East of the North East corner of said Lot 13; thence Southerly in a direct line to the point of beginning;	$18,000.00	$18,000.00	
	Parcel 2: That portion of Lots 12 and 13 of Stanford Avenue Tract, as per Map recorded in Book 55, Page 86, Misc. Records of said County, described as follows:— Beginning at a point on the Northerly line of 9th Street, 36.825 feet Easterly from the South West corner of said Lot 12; thence Easterly along the Northerly line of 9th St. 36.825 feet, to the South Westerly corner of land conveyed to Margaret and Thomas Birmingham, by deed recorded in Book 1476, Page 114, of Deeds,			

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-1—(Continued)

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
	Records of said County; thence Northerly along the Westerly line of said land conveyed to Birmingham, to the North line of said Lot 13; thence Westerly along the Northerly line of said Lots 13 and 12, to a point therein distant 13.2825 feet West from the North East corner of Lot 12, and thence Southerly to the point of beginning, being premises #907-909 East 9th St. Los Angeles, Calif.			
2	West 20 feet of Lot 207, East 30 feet of Lot 309 in Conner's Subdivision of the Johannsen Tract, as per book 15 page 86 of Miscellaneous Records of Lot Angeles County, California, being Nos. 4242, 4242¼ and 4242½ Normal Ave., Los Angeles, California	$ 8,000.00	$ 8,000.00	A 13
3	Lot 59 of Tract 1971 in County of Los Angeles, State of California, as per Map recorded in Book 22, page 185 of Maps in the Office of the Recorder of said County, Barnes City, Calif.	600.00	600.00	

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-1—(Continued)

Item No.	Description of property	Fair market value of the property at date of decedent's death	Amount to be included in gross estate	Rents and other income accrued to date of death
4	Bank account in Citizens National Trust & Savings Bank, Los Angeles, Hill Street branch	8,227.11	8,227.11	
5	Certificate Fidelity Savings & Loan Association and accrued interest	516.32	516.32	
6	Savings Bank account First National Bank of Los Angeles, with accrued interest	189.45	189.45	
		$35,532.88	$35,532.88	

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SCHEDULE D-2

Other Miscellaneous Property
Instructions

Before this schedule is prepared, articles 12, 13 (4), and 13 (7) to 13 (10), inclusive of Regulations 70, 1929 Edition, should be read.

Under this schedule include all items of gross estate not returned under another schedule, including the following: Debts due the decedent; interests in business; claims, rights, royalties, pensions; leaseholds, judgments, shares in trust funds or in estates of decedents who died more than five years prior to the present decedent's death, or in estates of decedents who died within five years prior to

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-2—(Continued)

the present decedent's death where the share therein is not reported on Schedule G-1, or on another schedule of this return; household goods and personal effects, including wearing apparel; farm products and growing crops; livestock, farm machinery, automobiles, etc.

When an interest in a copartnership or unincorporated business is returned, submit in duplicate statement of assets and liabilities as of date of death and for the five years preceding death, and statement of the net earnings for the same five years. Good will must be accounted for. In general, the same information should be furnished and the same methods followed as in valuing close corporations.

In listing automobiles give make, model, year, and condition as of date of decedent's death.

In describing an annuity, the name and address of the grantor of the annuity should be given, or if payable out of a trust or other fund, such a description as will fully identify it. If payable for a term of years, the duration of the term and the date on which it began should be given, and if payable for the life of a person other than the decedent, the date of birth of such person should be stated.

Judgments should be described by giving the title of the cause and the name of the court in which rendered, date of judgment, name and address of judgment debtor, amount of judgment, rate

Plaintiff's Exhibit No. 2—(Continued)
Schedule D-2—(Continued)

of interest to which subject, whether any payments have been made thereon, and if so, when and in what amounts.

Did the decedent, at the time of his death, own any interest in a copartnership or unincorporated business? (Answer "Yes" or "No").....

Did the decedent, at the time of his death, own any miscellaneous property not returnable under any other schedule? (Answer "Yes" o r"No.") Yes.

Item No.	Description	Fair market value at date of death	Interest and other income accrued to date of death
1	Household furniture and goods located at #213 No. Norton Ave., Los Angeles, Calif.	$ 900.00	$
2	Household furniture and goods located at #4242¼ Normal Ave., Los Angeles, Calif.	80.00	
3	Packard De Luxe Sedan, 1929 model, Motor Number 235,491, bought Sept. 14, 1928	1,000.00	
4	Bonus due from Bullock's, Inc., in the sum of $6,166.67	$ 6,166.67	
	Totals	$ 8,146.67	
	Grand Total		$ 8,146.67

(If more space is needed, insert additional sheets of same size)

Estate of Willard Orlando Sampson, Date of death December 28, 1930.

D-2 A15

Plaintiff's Exhibit No. 2—(Continued)

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SCHEDULE E

Transfers

Instructions

All gifts or transfers, by trusts or otherwise, made or created and completed by the decedent, subsequent to September 8, 1916, in contemplation of, or intended to take effect in possession or enjoyment at or after death, other than as bona fide sales for an adequate and full consideration in money or money's worth, are subject to the tax and must be returned under this schedule and the value of the property entered in the fourth column.

Transfers made by the decedent in his lifetime, other than transfers intended to take effect in possession or enjoyment at or after death, excepting bona fide sales for an adequate and full consideration in money or money's worth, must be returned for tax or disclosed in the return as follows:

1. Transfers Made in Contemplation of Death.—The executor must return for tax the value as of the date of decedent's death of all property transferred by the decedent at any time in contemplation of death.
2. Transfers Not Admitted to Have Been Made in Contemplation of Death.—(a) The executor is required to disclose in the return all transfers made at any time by the decedent of an amount or value of $5,000 or more. Any such transfer made within two years of decedent's death, but before the effective date of

Plaintiff's Exhibit No. 2—(Continued)
Schedule E—(Continued)

the Revenue Act of 1926, and constituting a material part of decedent's property and in the nature of a final disposition or distribution thereof, is deemed to have been made in contemplation of death within the meaning of the statute. Where the executor contends that the transfer was not made in contemplation of death, he must file with the return sworn statements in duplicate of all the material facts including, among other things, the decedent's motive in making the transfers, his mental and physical condition at that time, and one copy of the death certificate. (b) The executor is required to return for tax all transfers made by the decedent within two years prior to his death but after the effective date of the Revenue Act of 1926, to the extent that the value thereof to any one person is in excess of $5,000 even though the transfer is not admitted to have been made in contemplation of death. The entire value of the transfer should be disclosed in the return.

All property transferred, whether before or after September 8, 1916, by the decedent during his lifetime, except bona fide sales for an adequate and full consideration in money or money's worth, received by the decedent, constitutes a part of the gross estate if the decedent reserved the income or enjoyment for his lifetime, or if, at the time

Plaintiff's Exhibit No. 2—(Continued)
Schedule E—(Continued)

of the decedent's death the enjoyment thereof was subject to any change through the exercise of a power to alter, amend, or revoke, either by the decedent alone or in conjunction with any person, or if, in any way, the transfer was incomplete. Where property was so transferred and the decedent, in contemplation of death, relinquished the power to alter, amend, or revoke the transfer, the transfer is subject to tax, and the value of the property must be included in columns 3 and 4 of this schedule.

Where the transfer was effected by an instrument in writing, two copies of such instrument should be filed with the return, one copy of which must be certified or verified, unless the decedent was a nonresident, in which case but one copy, certified or verified, need be filed.

The name of transferee, date and form of transfer, description of property, and fair market value at time of death should be set forth in this schedule. For further instructions see articles 15 to 21, inclusive, Regulations No. 70, 1929 Edition.

(1) Did the decedent, at any time during his life, make any transfer in contemplation of or intended to take effect in possession or enjoyment at or after his death, other than by bona fide sale for an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(2) Did the decedent, within two years immedi-

Plaintiff's Exhibit No. 2—(Continued)
Schedule E—(Continued)

ately preceding his death, make any transfer of a material part of his property without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(3) Did the decedent, within two years immediately preceding his death, make any transfer of an amount or value equal to or exceeding $5,000 without an adequate and full consideration in money or money's worth? (Answer "Yes" or "No.") No.

(4) Did the decedent, at any time, make a transfer of a material part of his property without an adequate and full consideration in money or money's worth, but not believed to have been in contemplation of death or intended to take effect in possession or enjoyment at or after his death? (Answer "Yes" or "No.") No.

(5) If the answer to question (4) is "Yes," state date, amount or value, and motive which actuated the decedent in making the transfer or transfers:

. . . . . .
. . . . . .
. . . . . .
. . . . . .
. . . . . .

(6) Did the decedent, at the time of his death, possess the right (either alone or in conjunction with any person other than the beneficiary of

Plaintiff's Exhibit No. 2—(Continued)

Schedule E—(Continued)

the transfer), to change through the exercise of a power to alter, amend, or revoke the transfer of any property previously made by him? (Answer "Yes" or "No.") No.

(7) Did the decedent, at any time during his life, relinquish in contemplation of his death the power to alter, amend, or revoke any transfer previously made by him? (Answer "Yes" or "No.") No.

(8) If the answer to either questions (6) or (7), or both of them, is "Yes," the value of the property transferred must be entered in column 4 for inclusion in the gross estate.

(9) Were there in existence at the time of the decedent's death any trusts created by him during his lifetime? (Answer "Yes" or "No.") No.

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(Page 12)

Schedule E—Continued

(For Instructions See Page 11)

Item No.	Description of property transferred and details of transfer	Fair market value at date of death	Fair market value to be included in gross estate	Rents and other income accrued to date of death
		$	$	$
	None			
	Totals			$ None
	Grand Total			$

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

E A 17

Plaintiff's Exhibit No. 2—(Continued)

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SCHEDULE F

Powers of Appointment

Instructions

Property passing under a general power of appointment exercised in the decedent's will must be returned. If the decedent exercised a general power by deed, the value of the property must be included in the gross estate if the deed was made in contemplation of death or intended to take effect in possession or enjoyment at or after death, except where executed for an adequate and full consideration in money or money's worth received by the decedent. If the power is exercised for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there should be included in the gross estate only the excess of the fair market value, at the time of decedent's death, of the property passing under the power over the value of the consideration received by the decedent.

Duplicate copies of the will or deed conferring the power upon the decedent, and of the instrument by which the power was exercised, must be filed with the return, and one copy of such will or deed and one copy of the instrument must be duly certified or verified, unless the decedent was a nonresident, in which case but one copy of each document certified or verified, need be filed. The

Plaintiff's Exhibit No. 2—(Continued)

Schedule F—(Continued)

copies should be filed even though it is contended that the power was a limited one and the property passing thereunder is not returned as taxable.

Property passing under the exercise of a power of appointment should not be listed under any other schedule.

For further instructions see article 24, Regulation No. 70, 1929 Edition.

(1) Did the decedent, at any time, by will or otherwise, transfer property by the exercise of a general power of appointment? (Answer "Yes" or "No.") No.

(2) Did the decedent, at any time, by will or otherwise, exercise a limited power of appointment? (Answer "Yes" or "No.") No.

Item No.	Description and details	Fair market value at date of death	Rents and other income accrued to date of death
	None		
Totals		$	$ None
Grand Total			$

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

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Plaintiff's Exhibit No. 2—(Continued)

[Page 14]

SCHEDULE G-1

Property Identified As Previously Taxed

Instructions

This schedule, as indicated in Instruction 8, page 2, is set up merely to facilitate the computation of the deduction claimed under Schedule G-2, inasmuch as such deduction may not exceed the value of the property included in this estate with respect to which the deduction is claimed. Such property should be returned in this schedule and under no other schedule.

The items in this schedule are to be listed on page 15, one item number serving for the item in Schedule G-1 and the corresponding item in Schedule G-2. The fair market value at the date of death of the present decedent should be entered in column 1 and the accruals in column 2.

For instructions concerning the description and valuation of the various classes of property in this schedule, reference should be made to the applicable instructions given with respect to the preceding schedules.

DEDUCTIONS—SCHEDULE G-2

Deduction For Property Identified As Previously Taxed Instructions

The statute imposes various restrictions and limitations upon this deduction. Therefore, the explanatory articles 41, 42, and 43 of Regulations 70,

Plaintiff's Exhibit No. 2—(Continued)
Schedule G-2—(Continued)

1929 Edition, should be carefully read. If decedent was a nonresident, article 53 of the Regulations is applicable.

Deduction with respect to property forming part of the gross estate situated in the United States of any person who died within five years prior to the death of the present decedent, which property was received by him, from such prior decedent, by gift, bequest, devise, or inheritance, may be claimed in Schedule G-2, if there is included under Schedule G-1, the value of such property or the value of property which can be identified as having been acquired in exchange for such property.

The items in Schedule G-2 should be arranged in the order in which they appear in the Federal estate-tax return for the prior estate. The description should include a reference to the schedule and item number in such return. To make it clear that the schedule and item number relate to the prior return, they should be included in parentheses. If only a portion of an item in the prior estate is reflected in the present estate, that fact should be indicated and only a proportionate part of the value of the item in the prior estate, as determined by the Commission (indicated in the closing letter), should be entered in column 3.

In general, the amount to be entered in column 4 is the amount in column 1 or the amount in column 3, whichever is the lower.

If the present decedent exchanged property which

Plaintiff's Exhibit No. 2—(Continued)
Schedule G-2—(Continued)

had been received by him from the prior decedent, and additional valuable consideration was given by him in such exchange, there may be deducted in this schedule such proportion only of the value, at the date of his death, of the property so acquired by the present decedent in such exchange as the value of the property received by him from such donor or prior decedent, and parted with by him in the exchange, bore to the entire consideration given. For example: An item of property received from a donor or a prior decedent, which had a value of $10,000, was exchanged for property valued at $15,000, and an additional $5,000 consideration was given by the present decedent. The full value at date of the present decedent's death of the property acquired in exchange should be listed under Schedule G-1 and two-thirds of such value deducted under Schedule G-2. The $10,000 and $15,000 values referred to in this example relate to the values as of the date of the exchange.

If the proceeds of several items in the prior estate were deposited in a bank account from which money was thereafter drawn to purchase property listed in Schedule G-1, the items should be grouped as a single item in this schedule, the several items in the prior estate being indicated by letters as "Item 1-a," "Item 1-b," etc. In this connection particular attention is directed to the fact that the burden of proof rests upon the taxpayer claiming the deduction. For example: The decedent deposited $10,-

Plaintiff's Exhibit No. 2—(Continued)
Schedule G-2—(Continued)

000, received as a legacy from the prior estate, in a bank account in which he already had $5,000. He next deposited in the account $1,000 received as salary. Thereupon he gave a check for $10,000 in payment for bonds of which the value is included in the gross estate. The check must represent $4,000 of previously taxed property. Therefore, as shown in the previous example, four-tenths of the value of the bonds is to be considered in determining the amount to be deducted. In either of the examples given, the transaction involved should be fully explained in an affidavit filed with the return.

The following entries will illustrate the manner of preparing the combined schedules:

Plaintiff's Exhibit No. 2—(Continued)
Schedule G-2—(Continued)

Item No.	Description	Schedule G-1 Column 1	Schedule G-1 Column 2	Schedule G-2 Column 3	Schedule G-2 Column 4
1	NW ¼ Sec. 10, T. 2 N., R. 4 W.,.....P.M.....	$16,000.00	$125.00	.....	.....
	(A-3)	.....	.....	$20,000.00	$16,000.00
2a	$10,000 U. S. 4th Liberty 4¼s @ 102-1/32.....	10,203.13	.....	.....	.....
b	100 sh. U. S. Steel Corp., com., par $100 @ 138½	13,850.00	.....	.....	.....
a	(B-11)	.....	.....	4,500.00	.....
b	(C-7)	.....	.....	20,000.00	.....
	See affidavit, Exhibit Y, concerning sales of these items and deposit of proceeds in bank account and purchase of items 2-a and 2-b, Schedule G-1	.....	.....	.....	11,333.33
3	SW ¼ of Sec. 10, T. 2 N., R. 4 W.,.....P.M.....	16,000.00	.....	.....	.....
	D-2-7) ½ interest	.....	.....	10,000.00	8,000.00

Analogous rules apply to the deduction based upon property with respect to which a gift tax was paid.

Name of donor or prior decedent.....

(Strike out words not applicable)

If a decedent, show date of death.....

Residence of donor at time of gift, or of decedent at time of death.....

G-1 G-2

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SCHEDULES G-1 AND G-2

Item No.	Description	Schedule G-1 Fair market value at date of present decedent's death (Column 1)	Schedule G-1 Rents and other income accrued to date of present decedent's death (Column 2)	Schedule G-2 Commissioner's valuation of property in prior estate (Column 3)	Schedule G-2 Amount to be deducted (Column 4)
		$.....	$.....	$.....	$.....
	None				
	Totals, Schedule G-1.....	$.....	$.....		
	Grand Total, Schedule G-1 (to be included in the gross estate)....		$.....		
	R. Aggregate of items in Schedule G-2				$.....
	S. Aggregate amount of Schedule H, I, J, and K.....			$.....	
	T. Portion thereof proved (see affidavit, Exhibit No.....) to have been paid without recourse to property listed in Schedule G-1			.....	
	U. Difference between S and T (enter in column 4).....				$.....
	V. Deduction claimed (R minus U)				$ None

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson Date of death December 28, 1930

G-1 G-2 A 20

Mae H. Sampson

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Plaintiff's Exhibit No. 2—(Continued)

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DEDUCTIONS

SCHEDULE H

Funeral and Administration Expenses

Instructions

Funeral expenses and administration expenses should be itemized, giving names and addresses of persons to whom payable, and exact nature of the particular expense. Preserve all vouchers and receipts for inspection by an internal-revenue agent.

No deduction may be taken upon the basis of a vague or uncertain estimate.

Executors' or administrators' commission should be entered in the amount actually paid, or which it is reasonably expected will be paid, not to exceed the amount allowable by the laws of the jurisdiction wherein the estate is administered, and not in excess of the amount usually allowed in cases similar to that of this estate. Where the commission has not been awarded by the court, deduction on final audit is discretionary with the Commissioner, subject to future adjustment.

Attorneys' fee should be deducted in the amount paid, or to be paid. If the fee has not been paid at the time of the final audit, deduction is discretionary with the Commissioner, subject to future adjustment.

Estate, legacy, succession, and inheritance taxes, and taxes on income received after death, are not deductible. Credit to a limited extent may, on page

Plaintiff's Exhibit No. 2—(Continued)

Schedule H—(Continued)

21 hereof, be claimed for estate, legacy, succession, inheritance, and gift taxes.

For further instructions see article 29 to 35, inclusive, and 52, Regulations No. 70, 1929 Edition.

Item No.		Amount of item	Totals
	Funeral expenses:		
1	A. E. Maynes, 1201 So. Hope St., Los Angeles, Funeral Director	$ 2,000.00	
2	Forest Lawn Memorial Park Association, Glendale, California, burial lot	654.00	
3	Music at Funeral	35.00	
	Total Funeral Expenses		$ 2,689.00
4	Executor's commission, estimated, ~~paid~~ (Strike out words not applicable)		$ 4,796.98
5	Attorney's fee, estimated, ~~paid~~ (Strike out words not applicable)		$ 4,796.98
	Miscellaneous administration expenses:		
6	Miscellaneous costs in Probate proceeding, etc.	34.05	34.05
7	Appraisal fees	500.00	500.00
8	Ernst & Ernst, accounting fees	400.00	400.00
	Total Miscellaneous Administration Expenses (If more space is needed, insert additional sheets of same size)		$13,217.01

Estate of William Orlando Sampson, Date of death, December 28, 1930.

H A 21

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Plaintiff's Exhibit No. 2—(Continued)

SCHEDULE I

Debts of Decedent

Instructions

Itemize fully below all valid debts of the decedent owed by him at the time of death.

If deduction is claimed for a debt, the amount of which is disputed or the subject of litigation, only such amount may be deducted as the estate concedes to be a valid claim. If the claim is contested, that fact should be stated.

A pledge, or a subscription evidence by a promissory note or otherwise, even though enforceable against the estate, is deductible only to the extent such pledge or subscription was made for an adequate and full consideration in cash or its equivalent received therefor by the decedent.

Enter in this schedule notes unsecured by mortgage and give full details, including name of payee, face and unpaid balance, date and term of note, interest rate and date to which interest was paid prior to death.

Care must be taken to state the exact nature of the claim as well as the name of the creditor. If the claim is for services rendered over a period of time, state the period covered by the claim. Example: Edison Electric Illuminating Company for electric service during December, 1928, $25.

All Vouchers or Original Records should be preserved for inspection by an internal-revenue agent.

Plaintiff's Exhibit No. 2—(Continued)
Schedule I—(Continued)

For further instructions see articles 29, 30, 36, 37, and 52, Regulations No. 70, 1929 Edition.

Item No.	Creditor and nature of claim	Amount
1	Dr. Charles A. Warmer, medical services last illness	$ 1,500.00
2	Robert W. Langley, M. D., medical services last illness	200.00
3	Ross Moore, M. D., medical services last illness	100.00
4	W. L. Huggins, M. D., medical services last illnes	100.00
5	F. S. Dolley, M. D., medical services last illness	100.00
6	Drs. Lissner & Rosenfeld, medical services last illness	100.00
7	Hollywood Hospital, expenses last illness	90.50
8	Community Chest, Decedent's pledge	300.00
9	Los Angeles Missionary & Church Ext. Soc., Decedent's pledge	1,800.00
10	First Methodist Church, Deeedent's pledge	500.00
11	Citizens National Trust & Savings Bank, Notes	35,000.00
12	Citizens National Trust & Savings Bank, Interest accrued to 12/28/30	150.83
13	Bullock's, Inc., miscellaneous expenditures account Deeedent	8,282.01
14	Mae Sampson, Note of Deeedent	1,032.37
15	Los Angeles Times bill	2.50
16	Broadway Florist, flowers	35.50
17	Parmalee-Dohrman, kitchen ware	6.45
18	Alexandria Florist, flowers	11.50
19	Earle C. Anthony, auto repairs	7.25
20	Bibliophile Society dues	10.00
21	Pacific Coast Club dues	11.40
22	Frank Mergenthaler and J. H. Breckenridge, legal services in connection with widening of 9th St. Los Angeles	200.00
23	Delinquent 1930 personal property taxes due Los Angeles County	7.20
24	R. C. Heinseh, fire insurance premium	3.50

Plaintiff's Exhibit No. 2—(Continued)
Schedule I—(Continued)

Item No.	Creditor and nature of claim	Amount
25	Golden State Co. Ltd., dairy bill	24.57
26	Wm. H. Metzger, fire insurance premium	28.00
	(Continued on annexed page)	
	Total—from annexed page	$ 119.82
	Total	$ 49,723.40

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

I A 23

Schedule I (Continued)

27	So. California Gas Co. Dec. 1930 bill	$ 15.81
28	So. California Telephone Co. Dec. 1930 bill	7.50
29	Golden State Creamery, December 1930 bill	30.81
30	Excelsior Laundry	9.66
31	W. H. Metzger Fire Insurance premium	2.50
32	Los Angeles Gas & Electric Co	6.24
33	Chapman Ice Cream Co. Dec. 1930 bill	2.75
34	Los Angeles Water & Power Dept. Dec. 1930 bill	4.55
35	Braasch Heater Co	18.00
36	Fred Azuma, Nov. 1930 bill	22.00
		$ 119.82
	Forward from first 26 items of Schedule I	$49,603.58
	Total of Schedule	$ 49,723.40

A 22

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SCHEDULE J

Mortgages, Net Losses, and Support of Dependents
Instructions

Mortgages.—Give location of property, name of mortgagee, date and term of mortgage, face amount,

Plaintiff's Exhibit No. 2—(Continued)
Schedule J—(Continued)

unpaid balance, rate of interest, date to which interest was paid prior to death. Identify by item number, as listed in Schedule A, the property securing each mortgage. Enter in fourth column accrued interest to the date of death. Mortgages upon, or any indebtedness in respect to, property included in the gross estate is deductible only to the extent that the liability for the mortgage or indebtedness was incurred or contracted bona fide and for an adequate and full consideration in money or money's worth received by the decedent. Unsecured notes should be listed on Schedule I.

Losses.—Losses are strictly limited to those arising from fire, storm, shipwreck, or other casualty, or from theft, to the extent that such losses are not compensated for by insurance or otherwise. Losses must occur during the settlement of the estate. Depreciation in the value of securities or other property does not constitute a deductible loss. In listing losses, full particulars must be given not only as to the loss sustained, but the cause thereof, and in the case of death of livestock, the cause of death must be stated, if known. If insurance or other compensation was received on account of loss, state the amount collected.

Support of Dependents.—No deduction may be taken for support of dependents unless the local law permits the allowance, the local court has made a decree specifying the amount thereof, and in fact the allowance was reasonably required for the sup-

Plaintiff's Exhibit No. 2—(Continued)
Schedule J—(Continued)

port of the person in question during the settlement of the estate, and actual disbursement was made from the assets of the estate to the dependents.

For further instructions see articles 38, 39, 40, and 52, Regulations No. 70, 1929 Edition.

Item No.	Mortgages	Unpaid amount at date of decedent's death	Interest accrued to date of death
1	Trust deed covering Item 1, Schedule A, and Item 1, Schedule D-1, Citizens National Trust and Savings Bank, beneficiary, dated May 8, 1928, three years, $20,000.00 interest 6% paid to Nov. 8, 1930	$ 20,000.	$ 166.66
	Totals	$ 20,000.	$ —166.66
	Grand Total		$ 20,166.66

(If more space is needed, insert additional sheets of same size)

Item No.	Losses during administration	Amount
		$
	Total	$

(If more space is needed, insert additional sheets of same size)

Item No.	Support of dependents	Amount
1	Widow's allowance granted by Superior Court of Los Angeles County, California, 12 months at $2,000.00 a month	$ 24,000.00
	Total	$ 24,000.00

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

Plaintiff's Exhibit No. 2—(Continued)

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SCHEDULE K

Charitable, Public, and Similar Gifts and Bequests

Instructions

When a deduction is claimed under this schedule, there must be submitted with the return: (1) Two copies of the will, one of which should be certified, or two copies of the instrument of gift, one of which should be certified or verified. Where decedent was a nonresident, but one copy of the document, certified or verified, need be furnished; (2) an affidavit of the executor showing whether the decedent's will has been, or to the best of his knowledge, information and belief will be contested.

If claim is made for deduction of the value of the residue or of a portion thereof (e. g., present worth of a remainder interest in the residue), there should be submitted a copy of the computation whereby the value was determined.

For further instructions see articles 44 to 47, inclusive, and 54, Regulations No. 70, 1929 Edition.

Item No.	Name and address of beneficiary	Character of Institution	Amount
	Total		$ None

(If more space is needed, insert additional sheets of same size)

Estate of William Orlando Sampson, Date of death December 28, 1930.

K A 25

Plaintiff's Exhibit No. 2—(Continued)

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SCHEDULE L

RECAPITULATION

Schedule	Gross Estate	Value
A	Real estate	$ 32,842.46
B	Stocks and bonds (grand total of all pages of this schedule)	273,188.53
C	Mortgages, notes, cash, and insurance	94,532.38
D-1	Jointly owned property	35,532.88
D-2	Other miscellaneous property	8,146.67
E	Transfers	—
F	Powers of appointment	—
G-1	Property identified as previously taxed	—
	Total Gross Estate	$444,242.92

Schedule	Deductions	Amount
G-2	Deduction for property identified as previously taxed	$ —
H	Funeral expenses	2,689.00
	Administration expenses:	
	Executors' commissions Estimated	4,796.98
	Attorneys' fees Estimated	4,796.98
	Miscellaneous	934.05
I	Debts of decedent	49,723.04
J	Unpaid mortgages	20,166.66
	Net losses during administration	—
	Support of dependents	24,000.00
K	Charitable, public, and similar gifts and bequests	—
	Specific exemption (resident decedents only)	*100,000.00
	Total Deductions	$207,106.71

Total gross estate	$444,242.92
Total deductions	207,106.71
Net Estate for Tax	$237,136.21

*If decedent died prior to 10:25 a. m., Washington, D. C., time, February 26, 1926, insert $50,000; if decedent died subsequent thereto, insert $100,000.

Plaintiff's Exhibit No. 2—(Continued)

SCHEDULE M

DEDUCTIONS—ESTATE OF NONRESIDENT

If the decedent was not a resident of the United States, Hawaii, or Alaska, no deductions whatever are allowable unless the value of that part of his gross estate situated outside the United States, Hawaii, or Alaska is set forth. If it be desired to claim deductions, execute Schedules H-I-J-K and compute the deductions allowable as follows:

1. Value of gross estate in United States (Schedules A, B, C, D, E, F, G-1)	$.....
2. Value of gross estate outside the United States (attach itemized schedule showing values)	.....
3. Value of total gross estate wherever situation (1 plus 2)	.....
4. Gross deductions under Schedules H, I, J	.....
5. Net deductions under Schedules H, I, J (that proportion of 4 that 1 bears to 3*)	.....
6. Schedules G-2 and K (within the United States)	.....
7. Total deductions allowable (5 plus 6)	.....
8. Net estate taxable (1 minus 7)	.....

*If death occurred prior to 8 a. m., Washington, D. C., time, May 29, the net deductions may not exceed 10 per cent of 1.

Estate of William Orlando Sampson, Date of birth December 28, 1930.

L M A 26

Plaintiff's Exhibit No. 2—(Continued)

(Page 21)

SCHEDULE N

RATES AND TAX DUE

Net Estate			(1)* Sept. 9, 1916, to Mar. 2, 1917, inclusive	(2)* Mar. 3, 1917, to Oct. 3, 1917, inclusive	(3)* Oct. 4, 1917, to Feb. 24, 1919, inclusive	(4)* Feb. 25, 1919, to Feb. 26, 1926, inclusive	(5)* On and after Feb. 26, 1926,	Amount of Tax
Exceeding—	Not exceeding—	Amount of block	Rate per cent	Rate per cent	Rate per cent	Rate per cent	Rate per cent	
	$50,000	$50,000	1	1½	2	1	1	$ 500.00
$50,000	100,000	50,000	2	3	4	2	2	1,000.00
100,000	150,000	50,000	2	3	4	2	3	1,500.00
150,000	200,000	50,000	3	4½	6	3	3	1,500.00
200,000	250,000	50,000	3	4½	6	3	4	1,485.45
250,000	400,000	150,000	4	6	8	4	4	
400,000	450,000	50,000	4	6	8	4	5	
450,000	600,000	150,000	5	7½	10	6	5	
600,000	750,000	150,000	5	7½	10	6	6	
750,000	800,000	50,000	5	7½	10	8	6	
800,000	1,000,000	200,000	5	7½	10	8	7	
1,000,000	1,500,000	500,000	6	9	12	10	8	
1,500,000	2,000,000	500,000	6	9	12	12	9	
2,000,000	2,500,000	500,000	7	10½	14	14	10	
2,500,000	3,000,000	500,000	7	10½	14	14	11	

Plaintiff's Exhibit No. 2—(Continued)

Schedule N—(Continued)

Net Estate			(1)* Sept. 9, 1916, to Mar. 2, 1917, inclusive	(2)* Mar. 3, 1917, to Oct. 3, 1917, inclusive	(3)* Oct. 4, 1917, to Feb. 24, 1919, inclusive	(4)* Feb. 25, 1919, to Feb. 26, 1926, inclusive	(5)* On and after Feb. 26, 1926,	Amount of Tax
Exceeding—	Not exceeding—	Amount of block	Rate per cent	Rate per cent	Rate per cent	Rate per cent	Rate per cent	
3,000,000	3,500,000	500,000	8	12	16	16	12	
3,500,000	4,000,000	500,000	8	12	16	16	13	
4,000,000	5,000,000	1,000,000	9	13½	18	18	14	
5,000,000	6,000,000	1,000,000	10	15	20	20	15	
6,000,000	7,000,000	1,000,000	10	15	20	20	16	
7,000,000	8,000,000	1,000,000	10	15	20	20	17	
8,000,000	9,000,000	1,000,000	10	15	22	22	18	
9,000,000	10,000,000	1,000,000	10	15	22	22	19	
10,000,000	.....	.....	10	15	25	25	20	

Total Estate Tax Shown by This Return		$ 5,985.45
†Credit for estate, inheritance, legacy, or succession tax (see article 9 (a), Regulations 70, 1929 Edition)	$ 4,788.36	
Credit for gift tax (see article 9 (b), Regulations 70, 1929 Edition)	.....	.....
Total Credits	.....	$ 4,788.36
Amount of estate tax payable after subtracting credits		$ 1,197.09

Plaintiff's Exhibit No. 2—(Continued)

Schedule N—(Continued)

*If the decedent's death occurred on the date of the passage of any of the revenue acts imposing the estate tax, care must be exercised to use the rates of tax in force at the exact instant of death. (See article 1, Regulations 70, 1929 Edition.)

†If the decedent died prior to 4.01 p. m., Washington, D. C., time, June 2, 1924, his estate is not entitled to any credit for estate, inheritance, legacy, or succession taxes paid. (See article 9 (a), Regulations 70, 1929 Edition.) Credit can not be allowed for any interest or penalties paid or for any discount allowed. The officer's certificate must show: (1) the total tax determined, (2) the discount allowed, (3) interest and penalties paid, and (4) the total amount paid in cash and the date of payment.

N Estate of William Orlando Sampson, Date of death December 28, 1930. A 27

Plaintiff's Exhibit No. 2—(Continued.)

[Page 22]

JURAT FOR EXECUTORS AND ADMINISTRATORS

I, Mae Sampson the undersigned executrix, do hereby solemnly swear—affirm that on the 23rd day of January, 1931, the Superior court at Los Angeles California granted letters testamentary upon the estate of the foregoing-named decedent to me; that I have made diligent search for property of every kind left by the decedent; that I have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible and intangible, forming the gross estate of the decedent so far as it has come to my knowledge and information; that I have carefully read all instructions under Schedule E of this form, and have made diligent and careful search for information as to whether the decedent, during his lifetime, made any transfers without a fair consideration in money or money's worth, and the answers given to the questions therein contained are true and complete to the best of my knowledge, information, and belief, and that I have no knowledge of any transfers made or trusts created by the decedent within two years of his death involving an amount or value equal to or exceeding $5,000, other than bona fide sales for a fair consideration in money or money's worth, except as stated in Schedule E; that to the best of my knowledge, information, and belief the value shown for each item of property listed in this return was the fair market value of

Plaintiff's Exhibit No. 2—(Continued)

the same at the day of decedent's death; and that the debts, expenses, and charges entered herein as deductions from the gross estate are correct and legally allowable.

JURAT FOR BENEFICIARIES, CUSTODIANS, AND TRUSTEES

I, Mae Sampson the undersigned beneficiary, do hereby solemnly swear—affirm that I have carefully read the instructions printed on this form; that hereon is listed all of the property, tangible or intangible, contained in the gross estate of the decedent which has come into my possession and control; that to the best of my knowledge, information, and belief, the value shown for each item of property listed hereon was the fair market value of the same at the time of the decedent's death; and that the debts, expenses, and charges entered hereon as deductions from the gross estate are correct and legally allowable.

(Name) MAE SAMPSON
(Address) #213 No. Norton Ave.,
Los Angeles, California.
(Name) .....
(Address) .....
(Name) .....
(Address) .....

Subscribed and sworn to before me, at Los Angeles, California this 16th day of December, 1931.

[Seal] JESS CHENOWETH
Notary Public

My Commission Expires June 8th, 1935.

Plaintiff's Exhibit No. 2—(Continued)

Note.—If there is more than one executor or administrator, all must sign and swear to the return. (The foregoing jurat may be sworn to before any person authorized to administer oaths except the attorney or attorneys representing the taxpayer. If the officer is a notary public or has an official seal, such seal must be affixed.)

Name and address of attorney

FRANK MERGENTHALER,
1025 Board of Trade Bldg.,
Los Angeles, Calif.

A28

[Page 23]

[Illegible] executor desires [illegible] represented by an attorney by correspondence or otherwise, the following power of attorney may be executed. See Treasury Department Circular No. 230 relative to admissions to practice before the Treasury Department. Application for admission should be directed to the Committee on Enrollment and Disbarment, Treasury Department, Washington, D. C., who will, upon request, supply the necessary forms and information. The use of the following form of power of attorney is entirely optional with the executor.

Power of Attorney

I Mae Sampson the undersigned executrix of the estate of the foregoing named decedent, have made, constituted and appointed, and, by these presents, do make, constitute and appoint Frank A. Mergenthaler, 1025 Board of Trade Bldg. of Los Angeles, Cali-

Plaintiff's Exhibit No. 2—(Continued)

fornia, my true and lawful attorney for me and in my name, place, and stead to appear for and represent me before the Bureau of Internal Revenue, or any unit, division, or agent or employee thereof, relative to the estate tax liability of said estate, giving and granting to said attorney full power and authority to do and perform any and every act and thing relative to the estate tax liability of this estate as full and to all intent and purposes as I might do if personally present.

Dated at Los Angeles, Calif., this 16th day of December, 1931.

MAE SAMPSON

Executed in presence of:

MIRIAM KELLY

JESS CHENOWETH

[Stamped]: Received Jan. 7, 1932, Public Relations Division. Recorded HCB 1/6/32, Estate Tax. Recorded Jan. 7, 1932, Public Relations Division.

Note.—The power of attorney must be witnessed by two disinterested individuals or acknowledged before a notary public, in which case there should be pasted or securely affixed a certificate of acknowledgment in the form provided by the law of the place where the instrument is executed.

A29

[Endorsed]: Filed Dec 14, 1936.

Mr. Mergenthaler: I desire to offer in evidence a 30-day letter from the Treasury Department of the United States, dated April 29, 1932, addressed to Mae Sampson, Executrix, covering the Federal Estate Tax return of W. O. Sampson, deceased.

The Clerk: Plaintiff's Exhibit No. 3.

(The letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 3.")

Mr. Mergenthaler: I would like to offer in evidence a conferee's letter, written by F. I. Lyon, Internal Revenue Agent, dated July 28, 1932, addressed to Mae Sampson, Executrix, in connection with the Federal Estate Tax on the estate of W. O. Sampson, deceased.

In connection with this exhibit, your Honor, I would like to call your Honor's attention to the fact that there have been some pencil or pen corrections in the document which govern the typewriting, because they were initialed by Mr. Lyon. There was a slight error in computation.

It is the pencil notations that govern. That is correct, is it not?

Mr. Mitchell: That is correct.

The Clerk: Plaintiff's Exhibit No. 4.

(The letter referred to was received in evidence and marked "Plaintiff's Exhibit No. 4.")

[3]

PLAINTIFF'S EXHIBIT No. 4

AMENDED

This summary, executed as directed, is to accompany each report of a final investigation of an estate by a Revenue Agent

TREASURY DEPARTMENT

INTERNAL REVENUE BUREAU—ESTATE TAX

Estate of Wm. O. Sampson
Residence—Los Angeles, California
Date of death—December 28, 1930
Executor or administrator—Mae Sampson

Collection district—6th California
Reporting officer—Corrie L. Arthur
Date of report—April 18, 1932
Address—Los Angeles

(The above data and that required in the first two columns ONLY will be inserted by the investigating officer)

	Returned (Form 706)	Recommended in report	Determined by Commissioner Tentative audit	Final audit
Gross Estate:				
Real estate	32,842.46	32,842.46		
Stocks and bonds	273,188.53	321,248.78		
Mortgages, notes, etc	94,525.13	95,291.79		
Jointly owned property	35,532.88	35,579.45		

Internal Revenue Bureau—Estate Tax—(Continued)

	Returned (Form 706)	Recommended in report	Determined by Commissioner Tentative audit	Determined by Commissioner Final audit
Other miscellaneous property	8,146.67	8,146.67		
Transfers				
Powers of appointment				
Property previously taxed				
Total Gross Estate	444,235.67	493,109.15		
Deductions:				
Property previously taxed				
Funeral expenses	2,689.00	2,689.00		
Executor's commissions	4,796.98	.....		
Attorney's fees	4,796.98	4,980.42		
Miscellaneous adm. expenses	934.05	934.05		
Debts of decedent	49,723.04	47,732.87		
Unpaid mortgages	20,166.66	20,166.66		
Net losses during settlement				
Support of dependents	24,000.00	22,000.00		
Charitable, etc., bequests				
Specific exemption (resident)	100,000.00	100,000.00		
Total Deductions	207,106.71	198,503.00		

Internal Revenue Bureau—Estate Tax—(Continued)

	Returned (Form 706)	Recommended in report	Determined by Commissioner Tentative audit	Final audit
Total Gross Estate	444,235.67	493,109.15		
Total Deductions	207,106.71	198,503.00		
Net Estate	237,128.96	294,606.15		
Aggregate tax on all complete blocks	4,500.00	6,500.00		
Tax on remainder at ....%	1,485.16	1,784.25		
Gross Tax	5,985.16	8,284.25		
Credit for State inheritance taxes	4,788.13	5,000.00	†5,968.09	F.I.L.
Credit for gift tax				
Net Tax	1,197.09	3,284.25	†2,316.16	F.I.L.
Deficiency Tax		2,087.16	†1,119.07	F.I.L.

†Pencil notations.

[Endorsed]: Filed Dec. 14, 1936.

Mr. Mergenthaler: I would like to offer in evidence a certified copy of the will of the decedent, certified by the clerk of the Superior Court.

The Clerk: Plaintiff's Exhibit No. 5.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 5.")

PLAINTIFF'S EXHIBIT No. 5

WILL

I, William Orlando Sampson, a resident of the City of Los Angeles, County of Los Angeles, State of California, being of the age of forty-six years, do make, publish and declare this my Last Will and Testament, hereby revoking all former wills by me at any time made.

First: I give, bequeath and devise to my beloved wife, Mae Sampson, all of my property of every kind and nature whatsoever and wheresoever situated.

Second: I make no provision for our children, Wilma Maud Sampson, Ruth Anna Sampson, Ralph Herrick Sampson and Clement Griffith Sampson, but leave the care and maintenance of said children to my said wife.

Third: I hereby nominate and appoint my said wife, Mae Sampson, executrix of this my Last Will and Testament, and request that she shall not be required to give any bond for the faithful performance of her duties as such executrix. And I hereby authorize my said executrix to sell, lease or other-

wise dispose of all or any part of my said estate without the order of any Court, at either public or private sale, with or without notice, and for such consideration and upon such terms as my said executrix may see fit.

In Witness Whereof, I have hereunto signed my name at Los Angeles, California, on this 9th day of November, 1918.

WILLIAM ORLANDO SAMPSON.

The foregoing instrument was, at the date hereof, by the said William Orlando Sampson signed and published as, and declared to be, his Last Will and Testament, in the presence of us, who, at his request and in his presence and in the presence of each other, have subscribed our names as witnesses hereto.

W. W. Miller, residing at 1943 So. Arlington St., Los Angeles.

W. E. Goodhue, residing at 319 N. Jackson St., Glendale, Calif.

Will admitted to probate this ....day of ....., 193..... Attest: L. E. Lampton, County Clerk. By .....Deputy.

#116257

Filed: Jan. 5-1931. L. E. Lampton, County Clerk. By J. R. Sweesy, Deputy.

[Endorsed]: Filed Dec. 4, 1936.

Probate Form 48 No. 116257
State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original Last Will and Testament (omitting Certificate of Proof of Will) in the Matter of the estate of William Orlando Sampson, dec'd., as the same appears of record, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court, this 4 day of Nov., 1936.

[Seal] L. E. LAMPTON,
County Clerk.
By G. F. COOPER,
Deputy.

Mr. Mergenthaler: I would like to offer in evidence a certified copy, certified by a clerk of the Superior Court of the State of California, appointing Mae Sampson as Executrix.

The Clerk: Plaintiff's Exhibit No. 6.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 6.") [4]

PLAINTIFF'S EXHIBIT No. 6

Probate Form 5

In the Superior Court of the State of California in and for the County of Los Angeles

In the Matter of the Estate of

WILLIAM ORLANDO SAMPSON, sometimes called WILLIAM O. SAMPSON, and W. O. SAMPSON,

Deceased.

LETTERS TESTAMENTARY

State of California,
County of Los Angeles—ss.

The Last Will and Testament of William Orlando Sampson, sometimes called William O. Sampson and W. O. Sampson, deceased, having been proved and recorded in the Superior Court of the State of California in and for the County of Los Angeles, Mae Sampson, who is named therein as such, is hereby appointed Executrix.

Witness, L. E. Lampton, Clerk of the Superior Court of the County of Los Angeles, with the seal of the court affixed, the 23 day of January, 1931.

By order of the court.

[Seal] L. E. LAMPTON,
County Clerk.
By H. L. PATCH,
Deputy.

State of California,
County of Los Angeles—ss.

I do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of California, and that I will faithfully perform, according to law, the duties of Executrix of the last Will and Testament of William Orlando Sampson, deceased.

MAE SAMPSON.

Subscribed and sworn to before me, this 23rd day of January, 1931.

[Seal] L. E. LAMPTON,
County Clerk.
By E. T. CROZIER,
Deputy.

State of California,
County of Los Angeles—ss.

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court within and for the County and State aforesaid, do hereby certify the foregoing to be a full, true and correct copy of the original Letters Testamentary granted herein, as the same appears on file in my office.

I further certify that said Letters have not been revoked and are in full force and effect at the present time, and entitled to full faith and credit.

In Witness Whereof, I hereunto set my hand and affixed the seal of the Superior Court this 4 day of Nov., 1936.

[Seal] L. E. LAMPTON,
County Clerk.
By G. F. COOPER,
Deputy.

Filed Jan. 23, 1931.
L. E. LAMPTON,
County Clerk.
By H. L. PATCH,
Deputy.

Book 38, Page 321.

[Endorsed]: Filed Dec. 14, 1936.

MRS. MAE SAMPSON,

called as a witness in her own behalf, having been first duly sworn, testified as follows:

Direct Examination

Mr. Mergenthaler: Mrs. Sampson, keep your voice up, please.

Q. Will you—you state your name is Mae Sampson Weyman? A. I do.

Q. And since the complaint in this case was filed, you have since intermarried, and your name is now Weyman? A. It is.

Q. You are the plaintiff in this case?

A. I am.

Q. You are the widow of W. O. Sampson, deceased? A. I am.

Q. When did Mr. Sampson die? [5]

(Testimony of Mrs. Mae Sampson.)

A. December 28, 1930.

Q. Mrs. Sampson, I show you a document which purports to be an agreement dated May 23, 1929, between William O. Sampson, party of the first part and Mae Sampson, party of the second part, and I ask you whether or not you have ever seen that document before.

A. (Examining document): I have.

Q. Whose signatures are appended to it?

A. Mr. William O. Sampson, my husband, and Mae Sampson.

Q. Is William O. Sampson your former husband? A. He is.

Q. And this other signature "Mae Sampson" is your signature? A. It is.

Q. Was a copy of that delivered to you by Mr. Sampson? A. It was.

Mr. Mergenthaler: If the Court please, I desire to offer this agreement in evidence.

Mr. Mitchell: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

The Court: That is another question of importance in [6] the case, and I will reserve the ruling on it. It may be marked.

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 7.")

PLAINTIFF'S EXHIBIT No. 7

This Agreement, made this 23rd day of May, 1929, between William O. Sampson, first party, and

(Testimony of Mrs. Mae Sampson.)

Mae Sampson, second party, both residing at Los Angeles, California,

Witnesseth: Whereas, the parties hereto intermarried on or about October 3, 1899, and since that time have been and now are husband and wife and living together as such; and

Whereas, said parties, since the date of their marriage have acquired certain property which, by virtue of the laws of the State of California and/or written agreement between the parties hereto, is the community property of the parties hereto; and the parties hereto are desirous that the rights and interests of the respective parties hereto in and to all their community property be expressly defined and established in accordance with the terms and provisions hereof;

Now, Therefore, in consideration of the love and affection which each of the parties hereto bears unto the other and of other good and valuable consideration, moving from each of the parties unto the other, it is hereby agreed as follows:

1. That all property now owned by the first party shall be and the same is hereby declared to be community property of the parties hereto.

2. That the respective interests of the parties hereto in their community property during continuance of the marriage relation are and shall be present, existing and equal interests under the management and control of the husband, first party hereto, as is provided in Sections 172 and 172 (a) of the Civil Code of the State of California.

(Testimony of Mrs. Mae Sampson.)

3. That this agreement is intended and shall be construed as defining the respective interests and rights of the parties hereto in and to all community property, and the rents, issues and profits thereof, heretofore or hereafter acquired by the parties hereto during the continuance of said marriage relation.

First party does hereby assign, transfer and convey unto second party such right, title and interest in and to said community property as may be necessary to carry into full force and effect the terms of this instrument.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

WILLIAM O. SAMPSON.
MAE SAMPSON.

State of California,
County of Los Angeles—ss.

On this 23rd day of May, 1929, before me, Laura J. Henderson, a Notary Public in and for said County, personally appeared William O. Sampson and Mae Sampson, known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

(Testimony of Mrs. Mae Sampson.)

Witness my hand and official seal.

[Seal] LAURA J. HENDERSON,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires Mar. 4, 1930.

[Endorsed]: Filed Dec. 14, 1936.

By Mr. Mergenthaler:

Q. Mrs. Sampson, did you have any conversation with Mr. Sampson at the time you entered into this agreement which has been offered as Plaintiff's Exhibit No. 7, relative to the purpose of the agreement?

Mr. Mergenthaler:

Q. Will you answer yes or no? [7]

A. Yes.

Q. Where was that conversation had?

A. In our home.

Q. Where was that?

A. At 213 North Norton.

Q. In the city of Los Angeles?

A. In Los Angeles.

Q. And who was present at the time and place?

A. Just Mr. Sampson and myself.

Q. And when did the conversation take place?

A. You mean the date?

Q. The approximate date.

(Testimony of Mrs. Mae Sampson.)

A. Well, I can't give you the exact date.

Q. Did you talk it over beforehand? [8]

A. Yes.

Q. Did he tell you why? A. Yes.

Q. And that was before you actually signed it?

A. Yes.

Q. What was the conversation then about, the purpose of the agreement?

A. Well, it was to have separate income tax returns, and my having a portion of the interest in it.

Q. Was that—did he say anything about the thing enabling you to return half the income?

A. Yes.

Q. What was that conversation?

A. (Pause): Well, I can't tell you, except that we would make two income tax reports.

Q. Now, Mrs. Sampson, what was the condition of Mr. Sampson's health at the time that he made this agreement of May 29, 19.. May 23, 1929?

A. It was perfect as far as any——

Q. (Interrupting): You saw him every day at that time? A. Every day.

Q. What was his occupation?

A. Secretary and treasurer of Bullock's.

Q. And did he attend business at Bullock's every day except Sunday?

A. Yes, every day. [9]

Q. And what time did he leave the house in the morning?

A. About a quarter of eight.

(Testimony of Mrs. Mae Sampson.)

Q. What time did he return?

A. At seven-thirty.

Q. He worked six days a week?

A. Yes.

Q. When he came home at night did he have any occupation that kept him busy?

A. Just working on books for two or three nights a week.

Q. How late would he work on the books?

A. Oh, ten or eleven o'clock.

Q. Did he take any exercise at that time?

A. Yes; about once a week.

Q. What form of exercise?

A. Horseback riding.

Q. Did he ever complain of any illness at or about the time the agreement was made?

A. Not any.

Q. Or for any considerable length of time did he make any complaint?

A. Not any.

Q. How about afterwards?

A. Not any.

Q. Coming down to—bringing your attention to November 1930, did Mr. Sampson—what happened in November 1930?

A. Well, he was taken ill. You mean that? [10]

Q. Yes.

A. He was taken ill I should say the 15th of November, or near that, the 15th or 16th of November.

Q. And was he confined to his home?

(Testimony of Mrs. Mae Sampson.)

A. He was confined to his home.

Q. How long was he confined to his home?

A. Just about six weeks, lacking two or three days.

Q. Then what happened after he left the house?

A. He was taken to the Hollywood Hospital.

Q. And how long after that did he die?

A. He died three days afterward.

Q. I think you testified he died of Lobar pneumonia?

A. Yes.

Q. Did Mr. Sampson ever say that this agreement was made in contemplation of death or to take effect at death?

A. No; he did not.

Q. The property that Mr. Sampson then owned was stocks and bonds and real estate?

A. Yes.

Q. Was there any income from that property?

A. From the stocks and bonds?

Q. Stocks and bonds.

A. Yes.

Q. Any other property?

A. Rents.

Q. Were there rents? [11]

A. Yes.

Q. What became of the rents which were received from these properties after May 23, 1929?

A. Well, they were placed—invested, reinvested to pay for stocks and put in the bank, a joint account.

(Testimony of Mrs. Mae Sampson.)

Q. They were deposited in the bank?

A. In the bank in a joint account.

Q. What bank were they deposited in?

A. The Citizen's Security.

Q. Who had—who were entitled to draw against the joint bank account?

A. We were both entitled to draw against it.

Q. Was all the income which was received from these properties deposited in that joint bank account down to the time of Mr. Sampson's death?

A. Yes.

Q. And you continued at all times to have a right to draw on that?

A. Yes sir.

Q. There was a joint bank balance at the time of Mr. Sampson's death?

A. Yes sir.

Q. In the Citizen's Bank?

A. Yes sir.

Q. When Mr. Sampson made this agreement in 1929, was he making any plans as to the future? [12]

A. Nothing.

Q. He was—was there no change?

A. Nothing at all.

Q. Things had gone on just the same as they had been for years before?

A. Absolutely.

Q. Now, Mrs. Sampson, a portion of the property which Mr. Sampson owned on May 2, 1929—

(Testimony of Mrs. Mae Sampson.)

May 23, 1929, was a large block of stock in Bullock's? A. Yes sir.

Q. Can you give us the history of that stock?

A. Well, in 1922, in May or June, he was given about two thousand and some shares—I can't remember just the figures, two hundred and ninety-three, I think, by Mr. Lutz, Arthur Lutz, and in '25, I think, he bought some one hundred and seventeen shares and also about twenty-eight hundred shares at that time. Later when they reorganized, those shares were exchanged for the twelve thousand five hundred shares of Bullock's. That was all you wanted?

Q. There was eleven thousand one hundred and fifty shares of that stock standing in his name at the date of his death? A. Yes.

Q. All the real estate was acquired from earnings that Mr. Sampson had made?

A. Yes sir.

Q. When you arrived here—when did you come to California, [13] you and Mr. Sampson?

A. We came the first part of 1910, in January.

Q. What property did you have then?

A. We didn't have anything.

Q. And all the property which was acquired by Mr. Sampson, other than a gift from Mr. Lutz, was acquired how?

A. By his own earnings.

Q. In the State of California?

(Testimony of Mrs. Mae Sampson.)

A. In the State of California.

Q. What was Mr. Sampson's salary at Bullock's subsequent to May 23, 1927—withdraw that.

What was Mr. Sampson's salary at Bullock's subsequent to July 29, 1927?

A. You mean after that, oh, about six hundred dollars a month, six hundred and twenty-five when he passed away.

Q. Did he receive a bonus? A. He did.

Q. What was the amount of that bonus?

A. The amount of the bonus was the amount of his salary.

Q. That bonus was given him each year?

A. Each year. [14]

Q. In other words, at the end of the year they doubled his salary?

A. Yes.

Q. Now, for the years 1929 and for 1930 did you and Mr. Sampson—withdraw the question.

How did you file your income tax returns for the years 1929 and 1930?

A. By two separate tax returns.

Q. One was filed by Mr. Sampson?

A. Yes.

Q. And the other was filed by you?

A. Yes.

Q. And did you divide the income from all of the property owned by you and Mr. Sampson equally on those returns?

A. Yes. [15]

(Testimony of Mrs. Mae Sampson.)

By Mr. Mergenthaler:

Q. Mrs. Sampson, did Mr.—do you know whether or not Mr. Sampson took out any insurance on his life subsequently to May 23, 1929?

A. Yes sir; he did.

Q. Did he take—when was the last insurance he took out?

A. In 1930.

Q. In what month?

A. In November.

Q. The early part of November?

A. Yes.

Q. And how much insurance was taken out at that time?

A. He took out $10,000 at one time and $20,000.

Q. And what insurance company was that insurance taken in?

A. The New England.

Q. The New England Mutual Life Insurance Company? A. Yes.

Q. Do you know how the premiums on the insurance were paid? Was it paid out of Mr. Sampson's salary? A. It was.

Q. Do you have any means of knowing how much of Mr. Sampson's earnings, made after July 29, 1927, remained in his estate?

A. How much of his earnings remained in the estate?

(Testimony of Mrs. Mae Sampson.)

Q. Yes, either in the form of cash or in the form of investments made from those earnings. [18]

The Court: What percentage was saved?

Mr. Mergenthaler: Yes, your Honor.

The Witness: Well, everything except what it took to live.

By Mr. Mergenthaler:

Q. Do you know what the approximate living expenses were per month?

A. What the living expenses were per month?

Q. Yes, after July 29, 1927.

A. They were—just our ordinary living, you mean?

Q. Yes.

A. Not counting any of the investments, but just the living?

Q. Yes, not what you saved.

A. Well, I should say probably—I can't tell you exactly, I think they varied from $400 per month or $350 per month, sometimes.

Q. Would you say $400 a month would be the amount of the living expenses?

A. The savings, you mean?

Q. The living expenses.

A. Yes, I think that would be just about $400.

Q. Mrs. Sampson, were the investments bought out of checks drawn on the joint bank account?

A. Yes.

Q. And that practice continued all through?

A. Yes sir. [19]

(Testimony of Mrs. Mae Sampson.)

Q. At the time the joint bank account was opened?

A. Yes.

Cross-Examination

By Mr. Mitchell:

Q. Did you have any account outside—rather did Mr. Sampson have any account outside of the joint bank account on which he drew?

A. Not anything.

Q. How long was the account a joint account at the time of Mr. Sampson's death?

A. Well, it has always been a joint account.

Q. You have always carried a joint account?

A. Always carried a joint account.

Q. A joint account as far back as 1920?

A. Yes sir; further back than that, always.

Q. Did you have a separate account?

A. I did not.

Q. At the time this contract was—by the way, where did you sign this contract, plaintiff's exhibit No. 7?

A. I signed it down in Mr. Sampson's office at Bullock's.

Q. That was on or about the 23rd of May, 1929?

A. Yes.

Q. Who else was present at that time?

A. No one except myself and Miss Henderson, the Notary.

Q. Was that before you had this conversation at home [20] with Mr. Sampson to which you testified, or after?

(Testimony of Mrs. Mae Sampson.)

A. After.

Q. It was after? A. Yes.

Q. And you didn't pay Mr. Sampson any consideration for the contract did you?

A. No.

Q. Or the transfer, or whatever it was?

A. No.

Q. I mean any money or property?

A. No.

Q. Anything of value? A. No.

Q. When did he deliver a copy to you?

A. Right after it was signed.

Q. Right after it was signed? A. Yes.

Q. And what was done with the original?

A. He had the original we kept.

Q. You kept an original?

A. Yes. I couldn't——

Q. (Interrupting) You didn't sign two copies did you? Or did you just have one, the original signed?

A. I don't know. I can't remember. I know I signed papers. I can't tell you that.

Q. Do you recall why the original was not recorded in [21] the County Recorder's Office?

A. I don't know.

Q. At the time of the transfer, when the contract was signed, or at any time thereafter, did Mr. Sampson deliver to you any of the certificates of Bullock's stock or any other certificates evidencing other stock owned by him at that time?

A. No.

(Testimony of Mrs. Mae Sampson.)

Q. Did he deliver to you any of the bonds he owned at the time?

A. (Shaking head negatively.)

Q. Did he deed to you any of the real estate that he owned at that time? A. No.

Mr. Mergenthaler: If the Court please, I object to that on the ground that it is incompetent, irrelevant and immaterial and has no bearing on any of the issues in this case.

The Court: Well, can't we agree, whatever effect it may have for argument, that there was no transfer or delivery of any property?

Mr. Mitchell: If Mr. Merganthaler will so stipulate.

The Court: Except what may be assumed to have been transferred by the document itself.

Mr. Mergenthaler: I can't stipulate, your Honor, because certain of this property was actually given to her in the [22] sense that——

The Court: (Interrupting) I mean transfer.

Mr. Mergenthaler: There was no endorsement of certificates and there was no deed. I can stipulate to that. [23]

The Court: At the time of the signing and delivering of Exhibit 7 there was no exchange of any other papers relative to the property, is that true?

The Witness: Yes.

The Court: And later, and pursuant to, there was no division of the property that you two held together, was there?

(Testimony of Mrs. Mae Sampson.)

The Witness: Just the joint tenancy in everything.

The Court: There was no exchange in any papers in regard to the titles?

The Witness: No. [24]

Mr. Mitchell: All right.

Q. I will ask Mrs. Sampson, then, what was done in performance of the contract by Mr. Sampson prior to his death.

A. (Pause) You mean this contract?

Q. This contract, Exhibit 7, yes.

A. Well, nothing, except what was done in May, that I know of. Anything——

Q. (Interrupting) What was done when?

A. What was done in May except the conversations, and what was done in May to execute it. [25]

Q. Now, as far as real estate was concerned, Mrs. Sampson, that stood in Mr. Sampson's name, did it not?

Mr. Mergenthaler: I object to that because it is contrary to the stipulation. The stipulation says that certain real estate was there and if it is limited to that real estate and does not include the joint tenancy real estate I think the question is proper.

Mr. Mitchell: Including, of course, the joint tenancy real estate.

The Witness: Yes.

By Mr. Mitchell:

Q. And was this contract, Plaintiff's Exhibit No. 7, the only documents that were executed at or

(Testimony of Mrs. Mae Sampson.)

about the time of the execution of Exhibit 7 to transfer any interest to you in that real estate?

A. The only document.

Q. That was the only document? [28]

A. Yes.

Q. Now, with respect to the real estate held in joint tenancy, were there any further documents executed by Mr. Sampson or by yourself in respect to the transfer to you of the interest in the joint tenancy real estate other than Plaintiff's Exhibit No. 7? A. No.

Q. Now, in respect to the corporate common and preferred stock, evidenced by certificates, were any documents or instruments executed by Mr. Sampson other than Plaintiff's Exhibit No. 7 in order to transfer any interest to you in that stock?

A. No.

Q. Now, in respect to the bonds payable to bearer, with interest accrued to December, was there any document other than Plaintiff's Exhibit No. 7 executed by Mr. Sampson? A. No sir.

Q. In order to transfer an interest in those bonds to you? A. No sir.

Q. Were the bonds, these bearer bonds—I believe they were—ever delivered to you?

A. No sir.

Q. Physically delivered to you?

A. No sir. [29]

Q. Now, promissory notes with interest. Were those notes, do you know, ever endorsed to you and delivered to you by Mr. Sampson?

(Testimony of Mrs. Mae Sampson.)

A. No; I don't remember.

Q. You don't recall any delivery or execution of any instrument other than Exhibit 7 in order to transfer an interest to you of those notes?

A. Yes.

Q. Did Mr. Sampson deposit all of his salary in this joint account?

A. Practically all of it.

Q. Do you know how long Mr. Sampson had planned to execute a contract similar to this contract, Plaintiff's Exhibit 7, in May 1929? [30]

A. I do not.

Q. Did you ever hear him express an intention of making such a contract prior to a day or two before it was executed? A. Oh yes.

Q. How long prior?

A. Well, I can't tell you just—it was before 1929, I know he had.

Q. You have no idea, then how long. How many times did he discuss it with you before it was executed?

A. Well, it was—I don't know. I couldn't tell you that. It was simply brought up from time to time, more than once or twice. He just spoke about making it, and just as I said it was on account of the income, my having my part in the business. [31]

Q. What did you say about that?

A. I thought it was all right. I thought it was perfectly legitimate.

Q. Your conversations were about your participating in the business, you say?

(Testimony of Mrs. Mae Sampson.)

A. Well, having my part of the earnings after 33 years of married life. We had always had conversations, and that is absolutely the only way I can answer it.

Q. I see. You were entitled to have some evidence of it?

A. Well, I don't know. He wanted it understood we were in joint tenancy, he and I were joint together with everything that was earned.

Q. Well now, was this in speaking of the joint bank account? A. Everything.

Q. All his earnings? A. Everything.

Q. Anything besides his future earnings—you are speaking of future earnings, or past earnings?

A. Everything, future and past and present.

Q. How about property? A. Everything.

Q. Real estate? A. Yes.

Q. But the plan to execute this agreement, so far as you [32] know, was first mentioned two or three days——

A. (Interrupting) No, more than two or three.

Q. (Continuing) Before it was executed?

A. No.

Q. How long before it was executed?

A. I don't know. I couldn't tell whether it was a few weeks or two or three months, or just exactly. We had spoken, that is all, just referred to it, that it was the proper thing to do. [33]

Mr. Mergenthaler: If the Court please, I would like to introduce another document which I overlooked. It is a certified copy of the order fixing

(Testimony of Mrs. Mae Sampson.)

the California inheritance tax, and shows payment of the tax.

If your Honor please, I would like to offer in evidence a certified copy of the order fixing the inheritance tax in the estate of William O. Sampson in the Superior Court of Los Angeles, and a certified copy of the receipt for inheritance tax for the purpose of showing they were entitled to their 80% credit on the tax.

Mr. Mitchell: We object to that on the ground that the figures have been stipulated to, I believe, haven't they, Mr. Mergenthaler, that is the amount the Plaintiff would be entitled to in the event of a judgment?

Mr. Mergenthaler: No, we have omitted that because—that is another point, your Honor. We cannot make a computation of the tax until the Court has determined the principles involved in the case so that the amount can be figured, and if it is agreeable to Mr. Mitchell and the Court we would like to stipulate that we will make the computation ourselves, later on, and if we cannot agree on the computations we will come in and take additional evidence. That is the method which is pursued under rule fifty before the board of tax appeals, which has a great deal of experience in these cases. They found that was the only practical way to handle the tax [39] matters

The Court: That is satisfactory to the Court.

Mr. Mitchell: Perfectly satisfactory to the Defendant.

(Testimony of Mrs. Mae Sampson.)

(The document referred to was received in evidence and marked "Plaintiff's Exhibit No. 8.")

[40]

PLAINTIFF'S EXHIBIT No. 8

In the Superior Court of the State of California in and for the County of Los Angeles

No. 116257

In the Matter of the Estate of

WILLIAM ORLANDO SAMPSON
Deceased

ORDER FIXING INHERITANCE TAX

John R. Moore, the duly and regularly appointed, qualified and acting inheritance tax appraiser in the above entitled proceeding, having filed herein his written report and appraisement, and no objections thereto having been filed herein, and it appearing to this court that said appraisement has been fairly and regularly made in accordance with law and the order of this court and that said report is true and correct, and that said decedent died on December 28th, 1930.

It is hereby ordered, adjudged and decreed:

First: That said report be, and the same is, hereby approved and confirmed as presented and filed.

Second: That the market value of the property subject to inheritance tax in the above entitled proceeding is $336,805.62; that the persons to whom said property passed from decedent, their relation-

(Testimony of Mrs. Mae Sampson.)

ship to decedent, the value of their respective interests in said property, and the taxes to which the same are respectively liable, are hereby assessed and fixed as follows:

Name and Relationship	Value of Interest	Tax
Mae Sampson, widow	336,805.62	6,231.25

That the total amount of inheritance tax due to the State of California out of said estate is $6,231.25.

Done in open court this 4th day of May, 1942.

FLORENCE M. BISCHOFF,
Court Commissioner of
Los Angeles County.

[Endorsed]: Filed May 4, 1932.

No. 18274

Office of the Treasurer of Los Angeles County, State of California, receipt for inheritance or transfer tax upon property passed from William Orlando Sampson, deceased, who died 12-28, 1930.

Received of Mae Sampson, executrix of the estate of the above-named deceased, the sum of Two Hundred Sixty-three and 16/100 Dollars, being the amount of the inheritance or transfer tax due the State of California under the provisions of the inheritance or transfer tax laws of said State upon the following gifts, legacies, inheritances, bequests, successions and transfers as determined and fixed by an order of the Superior Court of the above-named county, in the matter of the estate of the above-named deceased, heretofore duly made and entered therein.

(Testimony of Mrs. Mae Sampson.)

Name	Relationship	Value of Property Received	Tax
Mae Sampson	widow Case #116257		6,231.25

	6,231.25
Less payment on account Receipt #16937	5,000.00
" " " " 18243	968.09
Paid under protest	
Amount of Tax	263.16
Amount of Rebate (if paid within six months)	.....
Amount of Interest (at seven per cent)	.....
Amount of Interest (at ten per cent)	.....
Amount due State	263.16

Countersigned June 30, 1932.
(Seal) RAY L. RILEY, Controller of State.
By CLARENCE H. SMITH, Deputy.

Dated 6-27, 1932.

H. L. BYRAM,
County Treasurer.
By E. R. WHITCOMB,
Deputy Treasurer.

[Endorsed]: Filed Jul. 1, 1932.

(Testimony of Mrs. Mae Sampson.)

In the Superior Court of the State of California in and for the County of Los Angeles

No. 116257

In the matter of the estate of

WILLIAM ORLANDO SAMPSON, sometimes called WILLIAM O. SAMPSON and W. O. SAMPSON, Deceased

State of California
County of Los Angeles—ss.

CERTIFICATE

I, L. E. Lampton, County Clerk and ex-officio Clerk of the Superior Court within and for the County and State aforesaid, do hereby certify the foregoing to be a true, full and correct copy of the original.

ORDER FIXING INHERITANCE TAX
INHERITANCE OR TRANSFER
TAX RECEIPT

on file in my office in the matter of the estate of William Orlando Sampson, sometimes called William O. Sampson and W. O. Sampson, deceased.

That according to the records on file in my office William Orlando Sampson, etc. died on December 28th, 1930. That, so far as the records of my office show, no refund of the inheritance tax paid, or any

(Testimony of Mrs. Mae Sampson.)

part thereof, has been authorized and there is no claim therefor pending.

In witness whereof, I have hereunto set my hand and affixed the seal of said Superior Court this 14th day of December, 1936.

[Seal] L. E. LAMPTON,
County Clerk and ex-officio Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.
By EUNISE KEIFER,
Deputy.

[Endorsed]: Filed Dec. 14, 1936.

Redirect Examination

By Mr. Mergenthaler:

Q. Mrs. Weyman, you testified that the income of all the property covered by this agreement was placed in a joint bank account?

A. Yes sir.

Q. Will you—was there a safe deposit box?

A. Yes sir.

Q. Where was that safe deposit box?

A. At the Citizen's on Hill street.

Q. Were the stocks and bonds and the deeds and the title papers kept in that box?

A. Yes sir.

(Testimony of Mrs. Mae Sampson.)

Q. Did you have access to that box alone without Mr. Sampson? In other words, could you get in to the box without Mr. Sampson being present?

A. No.

Q. Did you both have to be present?

A. Yes, sir.

Q. Was the box in the joint names of you and Mr. Sampson?

A. Yes sir. [41]

Q. There was no different understanding than the agreement?

A. Yes; absolutely.

Q. Was there a different understanding?

A. Then what the agreement was?

Q. Yes.

A. I don't know what you mean. No Mr. Mergenthaler this was the only understanding we had.

Q. That is the only understanding you had with reference to all of the property?

A. Yes.

Q. Now, Mrs. Sampson, in the copy of the tax return, which is offered here as No. 2, there is set out in schedule C a number of policies of insurance that aggregate—the aggregate of which is $109,331.88, and was all of that insurance payable to you? Were you the beneficiary under those policies?

A. Yes sir.

Q. Did you collect that insurance?

A. I did.

(Testimony of Mrs. Mae Sampson.)

Q. Of that insurance, I understand $30,000 of it was [42] taken out in the New England Life Insurance Company in the early part of November, 1930? A. Yes.

Q. To whom was that policy of policies payable?

A. Payable to me.

Recross Examination

By Mr. Mitchell:

Q. Mrs. Weyman, when was it that this safe deposit box was taken out in your joint names?

A. When we first came to California in 1910.

Q. So at the time this contract in 1929 there was no change in that respect at all?

A. It has always been in joint tenancy as I remember. I couldn't swear to that.

Q. For many years prior to 1929——

A. (Interrupting) We have had a joint——

Q. (Continuing)——you have had a joint bank account, checking account, and a joint safe deposit?

A. I wouldn't say in 1910. I——

Q. (Interrupting) Well, it was many years prior to 1929, probably, was it not?

A. Because we never had any safe deposit boxes until we came to California. I can't remember just when that was turned over to me.

Q. Was it as early as 1920?

A. I think so. [43]

(Testimony of Mrs. Mae Sampson.)

Q. What is that?

A. I think so. I am not sure.

Q. Well, could it have been as late as 1925, or was it before that?

A. I really couldn't tell you.

Q. Well, was it as long as three years before 1929?

A. (Pause) When we commenced to acquire the stock is when we took the box out.

Q. That was sometime around 1922 to 1925?

A. Probably that was it.

Mr. Mitchell: That is all.

Mr. Mergenthaler: That is all.

(Witness excused)——

Mr. Mergenthaler: The Plaintiff rests.

Mr. Mitchell: The Defendant rests.

The Court: Well now, I suppose—I don't know just what you mean by resting in view of the stipulation we have. There may be some other testimony.

Mr. Mergenthaler: We rest, your Honor, until we get the additional evidence in. That is correct, and I have no doubt—I have considerable experience with the Bureau of Internal Revenue and I think there is no question that when the principles are established we will be able to arrive at a computation which will be acceptable to both parties. It is only in case we do get in to a wrangle about that that we will have to offer further evidence. [44]

The Court: Then, on the face of the record it is submitted?

Mr. Mitchell: Yes.

Mr. Mergenthaler: It is submitted subject to that.

Mr. Mitchell: Subject to the matter of the computation.

The Court: It is submitted except as to the computation, the amount of the judgment, if any.

Mr. Mitchell: The amount of judgment, if any.

The Court: All right.

Mr. Mitchell: I desire for the purpose of the record at this time to make a motion of judgment for the defendant on the ground that the evidence is insufficient to warrant a judgment in favor of the Plaintiff, and perhaps I will renew the motion at the time it is finally submitted. [45]

(Thereupon, at 3:40 o'clock P. M. the hearing in the above-entitled matter was concluded)——

[Endorsed]: Filed May 12, 1943. [47]

[Endorsed]: No. 10434, United States Circuit Court of Appeals for the Ninth Circuit. Josephine Welch Overton, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California, Appellant vs. Mae H. Sampson, individually and as Executrix under the Will of W. O. Sampson, deceased, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California Central Division.

Filed May 14, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10434

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, Deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the Will of W. O. Sampson, deceased,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

The issues involved on this appeal are:

(1st) Whether, in and by the May, 1929, instrument of transfer or otherwise, the donor-husband retained, until his death, control, possession, management, enjoyment, powers of disposal or other incidents of ownership of, or other economic benefits arising from the properties to which the transferred interest of the donee-wife attached, within the meaning of Sec. 302(c) of the Revenue Act of 1926?

(2d) Whether the indefeasible passing of decedent's May, 1929, gift to his wife was dependent upon contingencies terminable by the donor-husband's death, within the meaning of Sec. 302(c) of the Revenue Act of 1926?

(3d) Whether, in and by the instrument of trans-

fer or otherwise, the donor-husband retained until his death, exercisable powers to augment, lessen or destroy the donee-wife's enjoyment of the interest transferred to her, of the properties to which it attached, or retained until death the power to divest her of such interest, within the meaning of Sec. 302(d) of the Act?

The validity of the instrument of transfer and its effectiveness to pass an actual property interest to the donee-wife, are not questioned by appellant.

Appellant's Contentions.

Appellant contends that the value of the subject matter of the gift is includible in decedent's gross estate under the provisions of both Sections 302(c) and 302(d) of the Revenue Act of 1926, and that the correct answer to the three questions contained in above statement of the issues involved is "Yes".

Points relied upon by Appellant.

In support of above contentions appellant will urge the following points, to wit:

(1st) There is no evidence to support the trial court's implied finding to the effect that decedent's gift to his wife was not made by him to minimize Federal taxes.

(2d) There is no evidence to support the trial court's implied finding that none of the properties involved in the gift was traceable to the donor's personal earnings or to his separate property.

(3d) There is no evidence to support the trial court's implied finding that in and by the instrument of transfer the donor did not retain the management and control of the subject matter of the gift.

(4th) There is no evidence to support the trial court's implied finding that possession and enjoyment of such properties were transferred to the donee at the time of the May, 1929, gift, or to the effect that the title to such properties did not remain continuously in the donor's sole name until his death; or that the bearer bonds were delivered to the donee before the donor's death.

(5th) There is no evidence or law to support the trial court's implied finding and conclusion to the effect that there did not exist, after the gift and until the decedent's death, the possibility that the subject matter of the gift and the transferred interest to which it attached would not have reverted to the donor (a) upon the prior death of the donee, intestate, or (b) through the exercise of the donor's reserved rights and powers for his own benefit.

The trial court further erred:—

(6th) In refusing to interpret the instrument of transfer in accordance with the laws of the State of California.

(7th) In impliedly finding and concluding that upon the donor's death in December, 1930, substantial economic benefits and incidents of ownership in respect of the subject matter of the gift did not, for the first time, shift from him to the surviving donee.

(8th) In impliedly finding and concluding that in and by the instrument of transfer or otherwise the donor, in respect of the subject matter of the gift and the income therefrom, if any, did not retain until the moment of his death the following exclusive,

exercisable and enforceable rights, powers, economic benefits, and incidents of ownership, to wit:

(a) To possess, manage, and control such properties;

(b) Short of a gift, to dispose of and to contract respecting such personal properties and to hold the same in his sole name, all for his own benefit;

(c) To contract and incur personal debts, liabilities and obligations on the credit of all such properties, real and personal, and on the credit of the income therefrom, in unlimited amounts and in excess of the value thereof;

(d) To discharge his personal debts, liabilities and obligations with such personal properties and with the income from all of such properties, both before and after death;

(e) To lease such real properties for successive periods of one year and from month to month, to deliver possession to lessees and tenants, and to hold such real properties of record in his sole name;

(f) To wager and speculate with such personal properties, and with the income therefrom and also from such land;

(g) By testamentary direction, to compel his executor to sell specific properties, to which the donee's interest attached, to discharge (1) his personal debts, (2) the expenses of administering his estate, and (3) a family allowance; and

(h) To change the donee's enjoyment of the interest transferred to her and the enjoyment

by her of the properties to which such interest attached.

(9th) In impliedly finding and concluding that in and by the instrument of transfer or otherwise, and before the donor's death, the donee-wife acquired, in addition to certain protective rights and remedies, the right and power to possess, deal with, dispose of, contract respecting, discharge her personal debts with, and contract and incur personal debts, tort and statutory liabilities and obligations on the credit of, her interest and the properties to which such transferred interest attached.

(10th) In impliedly finding and concluding that, prior to the donor's death, the donee's interest in the subject matter of the gift ripened into full dominion.

(11th) In impliedly finding and concluding that the ultimate disposition of such properties to the donee was not held in suspense until the donor's death; and that the gift was complete, in substance, prior to the donor's death.

(12th) In impliedly finding and concluding that the decedent did not retain until his death the power to augment, lessen and completely destroy the donee's enjoyment of her interest and of the properties to which such interest attached.

(13th) In implied finding and concluding that the decedent did not retain until his death the power to divest the donee of her interest in such personal properties by direct disposal for a consideration, and in all of such properties, real and personal, by contracting and incurring personal debts, torts and

statutory liabilities and obligations in excess of the value thereof, with resulting execution sales, bankruptcy or death insolvent.

(14th) In overruling defendant's objections to the form of the Finding and Conclusions proposed by plaintiff.

(15th) In denying defendant's motion for leave to file her amended answer to plaintiffs, original complaint.

(16th) In denying defendant's motion for a new trial.

Dated: May 12, 1943.

LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States
Attorney.
By E. H. MITCHELL,
Attorneys for Appellant.

(Affidavit of Service of the foregoing document on Frank Mergenthaler, by mailing a copy on May 14, 1943.)

[Endorsed]: Filed May 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PARTS OF RECORD DEEMED NECESSARY FOR CONSIDERATION ON APPEAL

Pursuant to Rule 19-6 of this Court, appellant designates the parts of the Record which she thinks necessary for the consideration of the points listed in her Statement of Points on which she intends to rely, filed concurrently herewith, and the parts which she desires to have printed, to wit:

Documents	Pages of Certified Record
1. Names and addresses of attorneys	1
2. Complaint and all exhibits attached	2
3. Answer	17
4. Stipulation waiving jury	21
5. Minute order of August 31, 1937, vacating order of submission and resubmitting case to Judge Ralph E. Jenney	27
6. The trial court's Minute Order of May 18, 1938	28
7. Minute Order entered January 9, 1941, vacating original Opinion and directing that Findings and Conclusions be prepared by plaintiffs counsel	43
8. Order entered February 16, 1942, substituting Josephine Welch Overton, Executrix, as defendant in place of Welch, deceased	44
9. Supplemental Complaint filed May 9, 1942	46
10. Answer thereto filed June 10, 1942	50

Documents Pages of Certified Record

record and docket cause on appeal..... 108

24. Order and Stipulation concerning use on appeal of original exhibits in lieu of copies thereof, dated May 11, 1943..... 103

25. Stipulation as to contents of record on appeal, dated May 12, 1943..... 105

Note. Omit from the foregoing items, 1 through 25, all titles of court and cause, all signatures and verifications, and all endorsements, but print all order dates, all service and mailing dates, and all filing and entry dates.

26. Plaintiff's Exhibit 2—Federal Estate Tax Return.

Note. Print all of this Exhibit except the blue certificate and except the following pages, to wit: A-3, A-17, A-18, A-19, A-20 and A-25.

27. Plaintiff's Exhibit 4—Letter from the Revenue Agent to the plaintiff, dated July 28, 1932.

Note. Print only the last page, viz., Form 722, entitled "Amended".

28. The following portions of the Reporter's Transcript of Proceedings of December 14, 1936, to wit:

Title of court and cause and date of proceedings

Page 2, lines 4 to 16, inclusive

Page 2, line 19, to p. 4, line 3, inclusive

Page 4, lines 7 to 16, inclusive

Page 5, lines 4 to 6, inclusive

Page 5, lines 9 to 13, inclusive

Page 5, line 19, to p. 6, line 1, inclusive

Page 6, line 7, to p. 7, line 4, inclusive

Page 7, lines 14 to 18, inclusive
Page 7, line 26, to p. 8, line 13, inclusive
Page 8, line 25, to p. 9, line 15, inclusive
Page 11, line 14, to p. 14, line 13, inclusive
Page 14, lines 18 to 24, inclusive
Page 15, lines 3 to 18, inclusive
Page 20, line 4, to p. 23, line 4, inclusive
Page 24, first part of line 4 reading "The Court:"
Page 24, lines 10 to 20, inclusive
Page 25, lines 11 to 20, inclusive
Page 28, line 10, to p. 30, line 11, inclusive
Page 30, line 24, to p. 31, line 8, inclusive
Page 31, line 20, to p. 33, line 9, inclusive
Page 39, line 2, to p. 40, line 3, inclusive
Page 40, lines 25 and 26
Page 41, lines 3 to 23, inclusive
Page 42, line 6, to p. 45, line 14, inclusive
Page 47, lines 3 and 4.

29. Statement of points on which appellant intends to rely, captioned the Circuit Court of Appeals and filed concurrently with this Designation.

Note. Omit title of court, cause and signatures.

30. This Designation.

Dated: May 14, 1943.

LEO V. SILVERSTEIN,
United States Attorney.
E. H. MITCHELL,
Assistant United States Attorney.
By E. H. MITCHELL,
Attorneys for Appellant

(Affidavit of Service of the foregoing document on Frank Mergenthaler, by mailing a copy the 14th day of May, 1943.)

[Endorsed]: Filed May 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF RECORD APPELLEE DEEMS NECESSARY FOR CONSIDERATION ON APPEAL

Pursuant to Rule 19-6 of this Court, Appellee designates additional parts of the Record which she thinks necessary for consideration, and which she thinks material to the appeal, and the parts which she desires to have printed, to wit:

Documents

1. Plaintiff's Exhibit No. 2, all of Schedule A, excepting the blue certificate.
2. Plaintiff's Exhibit No. 5, Will of W. O. Sampson, deceased.
3. Plaintiff's Exhibit No. 6, Letters Testamentary upon the Will of W. O. Sampson, deceased.
4. Plaintiff's Exhibit No. 7, Agreement dated May 23, 1929.
5. Plaintiff's Exhibit No. 8, Order of the Superior Court of Los Angeles County fixing California

Inheritance Tax upon the Estate of W. O. Sampson, deceased.

6. The following portions of the Reporter's Transcript of Proceedings of December 14, 1936, to wit:

   Page 9, line 16 to p. 11, line 13, inclusive

   Page 18, line 1, to p. 20, line 2, inclusive

7. This Designation.

Dated: May 24, 1943.

FRANK MERGENTHALER,
Attorney for Appellee.

(Affidavit of Service of the foregoing document by mail to Leo H. Silverstein and E. H. Mitchell, by mailing copy on May 25, 1943.)

[Endorsed]: Filed May 26, 1943. Paul P. O'Brien, Clerk.

No. 10434.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the will of W. O. Sampson, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

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No. 10434.

IN THE

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Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the will of W. O. Sampson, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

Opinion Below.

The only opinion of the District Court, which is reported in 23 F. Supp. 271, was withdrawn by order entered January 9, 1941 [R. 49-50], reported in 40 F. Supp. 1014.

Jurisdiction.

This appeal [R. 112] involves federal estate taxes. The taxes in dispute were paid as follows: $1,197.09 on December 16, 1931; $223.81 on December 23, 1932 and

$254.21 on December 28, 1932. [R. 83.] Claim for refund was filed on November 24, 1933 [R. 85], pursuant to Section 910 of the Internal Revenue Code. The claim for refund was rejected by notice dated July 13, 1934. [R. 85.]

Within the time provided in Section 3772 of the Internal Revenue Code and on August 30, 1935, the taxpayer brought an action in the District Court for the Southern District of California, Central Division, for recovery of taxes paid. [R. 2-19.] Jurisdiction was conferred on the District Court by Section 24, Fifth, of the Judicial Code. Judgment was entered in the principal sum of $1,466.11, plus interest, on October 7, 1942. [R. 102-104.][1] Motion for a new trial was denied November 17, 1942. [R. 111-112.] Within three months and on February 16, 1943, a notice of appeal was filed [R. 112], pursuant to the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1935.

Question Presented.

On May 23, 1929, the decedent, William O. Sampson, and his wife, who were residents of California, entered into a written agreement by which decedent transferred to his wife an interest in various real and personal property, including (1) property then separately owned by the decedent and (2) community property acquired prior to the amendment to the California community property laws

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[1]Judgment was entered for the principal amount of $1,466.11, but the computation involved certain items which are not included in this appeal. According to a tentative computation made by the Bureau of Internal Revenue, the principal amount of the judgment, if the Collector is sustained on this appeal, should be reduced to $680.06. The difference represents the principal amount at stake.

which became effective June 29, 1927. The interest so transferred was the type of interest conferred by the amendment to the California law upon married women in community property acquired subsequent to July 29, 1927. The question is whether the full value or only one-half of the value of the two classes of property referred to is includible in decedent's gross estate under Section 302(c) and (d) of the Revenue Act of 1926.

Statutes and Regulations Involved.

The pertinent statutes and regulations are set forth in the Appendix, *infra*.

Statement.

So far as necessary to this appeal, the findings of fact made by the District Court may be summarized as follows:

1. The decedent, William O. Sampson, died on December 28, 1930. At all pertinent times he and his wife were residents of the State of California. [R. 82.] On May 23, 1929, decedent, designated as the first party, and his wife, designated as the second party, entered into a written agreement [R. 83-85] providing [R. 84]:

> 1. That all property now owned by the first party shall be and the same is hereby declared to be community property of the parties hereto.
>
> 2. That the respective interests of the parties hereto in their community property during the continuance of the marriage relation are and shall be present, existing and equal interests under the management and control of the husband, first party hereto, as is provided in Sections 172 and 172(a) of the Civil Code of the State of California.

3. That this agreement is intended and shall be construed as defining the respective interests and rights of the parties hereto in and to all community property, and the rents, issues and profits thereof, heretofore or hereafter acquired by the parties hereto during the continuance of said marriage relation.

First party does hereby assign, transfer and convey unto second party such right, title and interest in and to said community property as may be necessary to carry into full force and effect the terms of this instrument.

2. In computing the federal estate tax, the Commissioner of Internal Revenue included within decedent's gross estate the entire value of certain real and personal property which had been acquired by him prior to July 29, 1927. At the time of its acquisition, a part of the foregoing was (1) the separately-owned property of the decedent, received by gift, and the balance was (2) community property of the type then existent in California, acquired with funds earned by the decedent. [R. 87-90.] By force of the agreement of May 23, 1929, the two classes of property referred to were converted into community property of the spouses of the type acquired by California married persons after July 29, 1927. [R. 90-91.]

3. Appellee, as executrix under the will of the decedent, paid the taxes here in controversy. [R. 82-83.] Appellee then filed a claim for refund contending that only one-half of the value of the property in question was

properly includible in decedent's gross estate, in that it consisted at the time of decedent's death wholly of community property in which she, as decedent's widow, had a vested interest in the remaining one-half. [R. 9-19, 85.] The claim for refund was rejected in its entirety [R. 85], and the instant suit for refund was then brought against the Collector of Internal Revenue for the Sixth Collection District of California in office at the time payments of the tax were made. [R. 2-19, 81-83.] Upon the Collector's death during the pendency of the suit, his executrix, the appellant (also referred to herein as the Collector), was substituted in his place. [R. 50-51, 97-98.]

Following trial without a jury, the court below filed a written opinion holding that the full value of the property in question should be included within decedent's gross estate under Section 302 (c) and (d) of the Revenue Act of 1926. (23 F. Supp. 271.) On January 9, 1941, the opinion was withdrawn, due to the supervening decision of this Court in *United States v. Goodyear,* 99 F. (2d) 523, which the court below regarded as [R. 49]—

> controlling, as a matter of legal precedent, over the issues in the case at bar, even though the opinion heretofore rendered in this cause * * * expresses the view of this court as to a proper determination of said issues.

The court thereafter entered the findings of fact which have been summarized and, so far as now material, concluded as a matter of law that [R. 99-100]—

1. The effect of the agreement of May 23, 1929, was to vest in decedent's wife "a present, existing, and equal interest in the property" of the decedent, as if the property had been acquired from the community earnings of the decedent earned subsequent to July 29, 1927.

2. The interest in the property of the decedent and his wife so acquired under the agreement of May 23, 1929, was such as to require the exclusion from the decedent's gross estate of one-half of the value of all of the property owned by the decedent and his wife at the date of the former's death.

Statement of Points to Be Urged.

The Collector's statement of points, all of which are urged as grounds for reversal, is set out in full at pages 223-228 of the record. The critical error of the court below lies in its holding, under the compulsion of the decision of this Court in *United States v. Goodyear, supra,* that only one-half of the value of the property in question should be included in decedent's gross estate.

Summary of Argument.

A. This appeal concerns only the separately-owned property of the decedent and the pre-1927 California community property, which were included within the transfer agreement of May 23, 1929. By force of that agreement, these two classes of property were converted into post-1927 community property. The question is whether, upon the husband's death, the full value or only one-half the value of this property should be included within his gross estate for federal estate tax purposes. The case turns, not upon Section 302 (a) of the Revenue Act of

1926, but upon Section 302 (c) and (d), which expressly deal with *inter vivos* transfers and presuppose the transfer of an interest in property by the decedent prior to his death. A decision favorable to the Collector will require the overruling of *United States v. Goodyear,* 99 F. (2d) 523 (C. C. A. 9th). The importance of the question and the decisions of the Supreme Court of California and of the Supreme Court of the United States subsequent to that decision should lead this Court to overrule the *Goodyear* case if it is now satisfied that the Government's position is correct.

B. The rights reserved to the decedent under the 1929 transfer were the same as the rights which are vested in California husbands in post-1927 community property. The decedent thus reserved the management and control of the transferred property. He was able to divest his wife of her interest in any particular item or in all of the community property, real or personal. Upon his death, the community property remained subject to his liabilities and only the residue became available to his wife. In these crucial respects, the 1927 amendment to the California community property law made no change in the prior law.

C. Against this background, it seems clear that the 1927 amendment does not touch the application of Section 302 (c) and (d). In principle and under the decisions, the full value of the transferred property must be included in decedent's gross estate. Decedent's death was the indispensable condition which passed to the surviving wife valuable assurances that the interest transferred *inter vivos* would be reduced to her "possession" and "enjoyment."

ARGUMENT.

The Full Value of the Property in Question Should Be Included in Decedent's Gross Estate Under Section 302 (c) and (d) of the Revenue Act of 1926.

A. The Collector's Position on This Appeal.

This appeal involves only the decedent's separately-owned property and the pre-1927 community property, included within the transfer of May 23, 1929. The case turns upon Section 302 (c) and (d) of the Revenue Act of 1926. [Appendix, *infra.*] The pertinent regulations are Treasury Regulations 70 (1929 ed.), Articles 15, 17 and 19. [Appendix, *infra.*][2] If the case falls within either of these subsections of the statute, the full value of the property in question, rather than only one-half of the value as held by the court below, must be included within decedent's gross estate for purposes of the federal estate tax.

We recognize that a decision in favor of the Collector on this appeal will require the overruling of the decision of this Court in *United States v. Goodyear,* 99 F. (2d) 523, which was reached by a divided bench in October, 1938. Our normal reluctance in asking this Court to depart from an earlier decision is considerably lessened in the present instance by several important circumstances. This case involves (1) an appraisal of the substantial

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[2]We also print in the Appendix, *infra,* Section 81.17 of Treasury Regulations 105, promulgated under the Internal Revenue Code, since this section deals with the application of *Helvering v. Hallock,* 309 U. S. 106, and that decision, which deals with Section 302 (c), did not turn on any amendment made to Section 302 (c) subsequent to its enactment in 1926. It is proper to look to regulations promulgated under subsequent statutes for their significance in declaring the proper interpretation of an earlier statute. *Estate of Sanford v. Commissioner,* 308 U. S. 39, 49.

benefits and powers vested in the husband with respect to California community property and (2) the application of a federal revenue statute to the aggregate of advantages so established by state law. At the time of the *Goodyear* decision, the Supreme Court of California had not passed upon the 1927 amendment to the California community property law. Since that time the highest court of the state has examined the significance of that amendment. In addition, since the *Goodyear* decision there has been an extremely important decision of the Supreme Court of the United States under Section 302 (c)—*Helvering v. Hallock,* 309 U. S. 106—and there has been a series of other decisions re-emphasizing and applying to new facts the principle that the federal revenue laws are concerned not so much with the refinements of title as with the possession of control and enjoyment. This Court did not have the benefit of these decisions when it decided the *Goodyear* case in 1938. Nevertheless the case was decided by a divided court. The decisions affecting the issue which have been rendered since 1938 lend further support to the position of the Judge who dissented in that case and clearly justify an inquiry as to whether the premises on which the majority based its conclusion were sound.[3]

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[3]If this Court should now overrule the *Goodyear* decision, it would, we submit, simply be following the path already marked by its decisions in *Wardell v. Blum,* 276 Fed. 226, certiorari denied, 258 U. S. 617, and *Talcott v. United States,* 23 F. (2d) 897, certiorari denied, 277 U. S. 604. In the first of these cases (neither of which involved a transfer) it was held that upon the death of a husband only one-half of the value of California community property should be included within his gross estate. Following the decision of the Supreme Court of California in *Stewart v. Stewart,* 199 Cal. 318, and the decision of the Supreme Court of the United States in *United States v. Robbins,* 269 U. S. 315, this Court later held in the *Talcott* case, *supra,* that the full value of the community property should be included in the husband's gross estate. This was also the decision in *Title Insurance & Trust Co. v. Goodcell,* 60 F. (2d) 803 (C. C. A. 9th), certiorari denied, 288 U. S. 613.

A further circumstance also justifies re-examination of the *Goodyear* case. The federal estate tax, like the income tax, is related to ability to pay, and should, so far as possible, operate uniformly throughout the country and impose a like burden on the estates of married persons wherever domiciled. That married persons domiciled in the community property states possess tax advantages over those domiciled in the common law states cannot be denied.[4] Such an inequality and lack of uniformity should be restricted to instances where the reasons for it are compelling. The federal estate tax law does not itself establish one set of rules for determining the gross estate of a decedent spouse in the common law states and another set of rules for determining the gross estate of a decedent spouse in the community property states, and a difference in the tax burden is justified only if there are in fact substantial differences between the rights and privileges of the spouses in the two groups of states. It should not exist where there are merely differences in the labels given to similar rights and privileges. See *Morgan v. Commissioner*, 309 U. S. 78. Moreover, since the different subdivisions of Section 302, defining the gross estate, establish different criteria for the inclusion of property in the decedent's gross estate, judicial decisions establishing that under one subdivision only one-half of the community property is to be included in the gross estate do not justify any assumption that the same tax advantage accrues under a different subdivision. Tax advantages enjoyed by the spouses in the community

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[4]As to the magnitude of the discrimination against the inhabitants of the non-community property state permitted under the prevailing rule as to income, we need add nothing to the comments of Judge Haney, dissenting in *Black v. Commissioner*, 114 F. (2d) 355, 360 (C. C. A. 9th).

property states should be restricted in so far as they may be, consistently with settled judicial principles. If, therefore, this Court should feel that the *Goodyear* case was wrongly decided and that, as a matter of first impression, the decision would go for the Government, we submit that these considerations should remove any inhibition against a flat reversal of that holding.

The *Goodyear* decision has now been in the books for about five years. In *Helvering v. Hallock, supra,* the Supreme Court expressed no reluctance in overruling its earlier decision in *Helvering v. St. Louis Trust Co.,* 296 U. S. 39, although that case also had stood for more than four years. The Supreme Court said that this was not so long a period that (309 U. S. at p. 119) "by the accretion of time and the response of affairs, substantial interests have established themselves." In the instant case, it is noteworthy that the decedent could have placed no reliance upon the *Goodyear* decision, for the transfer was made in 1929 and his death occurred in 1930.

In the discussion which follows we examine under Point B, *infra,* the benefits and powers reserved to the husband under California community property law and under Point C, *infra,* the application of the estate tax to this aggregate of interests. At the outset, however, a further statement of our position and of the scope of Section 302 (c) and (d) seems desirable. It should be understood that we do not contend that the agreement of May 23, 1929, was ineffective to transfer to the wife an interest in the property. We assume that the wife took what she purported to take, namely, a "present, existing and equal" interest under the management and control of the husband, as provided in Sections 172 and 172 (a)

of the Civil Code of California; that is, the type of interest that married women in California take in community property acquired after July 29, 1927. Nor do we contend that the full value of community property acquired with the husband's earnings after July 29, 1927, is includible in his gross estate. If the value of the wife's one-half share in such property were to be taxed to the estate of the decedent, it would probably come within Section 302(a) of the statute, which is confined to property in which the decedent has an "interest" at the time of his death and has nothing to say of *inter vivos* transfers.[5] See *Gump v. Commissioner*, 124 F. (2d) 540 (C. C. A. 9th), certiorari denied, 316 U. S. 697. We rely, instead, upon Section 302 (c) and (d), which expressly deals with *inter vivos* transfers by the decedent.

Subsections (c) and (d) of Section 302 in identical language deal with "any interest" in property "of which the decedent has at any time made a transfer, by trust or otherwise." When the transfer of such property falls within the provisions of either of these subsections, its full value is included in the decedent's gross estate. From the quoted language it will be seen that both subsections take as their starting point the fact that the decedent has made an *inter vivos* transfer of a property interest (of whatever kind) and, necessarily, no longer has the transferred interest at the date of his death. That legal title to the property or any other specific interest has been conveyed away *inter vivos* thus invites, rather than fore-

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[5]However, by Section 402 of the Revenue Act of 1942, c. 619, 56 Stat. 798, the full value of community property acquired subsequent to July 29, 1927, will be included in the estate of the spouse first to die, where death occurs after the effective date of that section, except that portion actually contributed by the surviving spouse.

closes, further scrutiny. See *Helvering v. Hallock,* 309 U. S. at pp. 110-111, as to Section 302 (c), and *Porter v. Commissioner,* 288 U. S. 436, 443, as to Section 302 (d). In this crucial respect Section 302 (c) and (d) must be sharply distinguished from Section 302 (a).

Under subsection (c) the full value of the transferred property is taxable to the decedent where the interest transferred is "intended to take effect in possession or enjoyment at or after his death." Under subsection (d) the full value of the transferred property is taxable to the decedent where the enjoyment of the transferred interest is "subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke." The purpose of these provisions is to prevent the avoidance of the estate tax by means of a transfer by the person to whose estate the property would otherwise be taxable, unless the transfer in fact as well as form terminates the decedent's connection with the property. Where the transfer is complete in form but the decedent retains strings through which control can be asserted or benefits diverted to himself, the full value of the property remains includible within his gross estate.[6]

From the very nature of these provisions, it is unimportant that the aggregate of the benefits and powers vested in the decedent would not, apart from the element of the transfer, be sufficient to bring down the tax. To take a simple illustration, under Section 302 (c), if A

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[6]These subsections thus apply with particular force to transfers such as that involved here, the underlying purpose of which is not to effect a change in property interests but simply to save taxes. That this was the underlying purpose of the transfer of May 23, 1929, seems clear from the uncontradicted testimony. [R. 197, 202.]

transfers a life estate to B with remainder in fee to B unless A survives him, and in that event a reversion to A, the value of the reversion must be included in A's estate upon A's death prior to B's. On the other hand, if A transfers a life estate to B with remainder in fee to B unless C survives B, and in that event remainder in fee to C, the value of C's contingent remainder in fee is not includible within C's gross estate upon his death prior to B's.[7] In these two situations, it will be seen that after the transfers the contingent interests of A and C, respectively, are identical. The difference in tax consequences flows from the fact that it was A who was the original owner of the property and that it was A who made the transfer.[8] Accordingly, no confusion should result from the fact that on this appeal we assume that community property *acquired* after July 29, 1927, with respect to which no transfer is involved, is includible in the decedent's estate only to the extent of one-half of its value.

From the foregoing it should also be clear that our position involves no attack upon *United States v. Malcolm.*

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[7]Compare the Court's decision in *Helvering v. Hallock, supra,* with the examples cited by Mr. Justice Roberts in his dissenting opinion in that case.

[8]Also see *White v. Poor,* 296 U. S. 98, involving Section 302 (d), which emphasizes to an extreme degree the importance of a transfer and the reservation to the decedent of powers with respect to the transferred interest. In that case the decedent established a trust naming herself one of three trustees, and provided that the trustees might at any time terminate the trust. She later resigned as trustee but was reappointed with the approval, as required by the trust instrument, of the other trustees and the beneficiaries. Referring to her reappointment, the Court said (p. 102):

> "She then acquired any power for the future to participate in a termination of the trust solely by virtue of the action of the other trustees and the beneficiaries *and not in any sense by virtue of any power reserved to herself as settlor in the original declaration of trust.*" [Italics supplied.]

On this basis, the case was held to fall outside Section 302 (d) and decision went for the taxpayer. (A second, independent ground of decision is not material here.)

282 U. S. 792, or upon *Poe v. Seaborn,* 282 U. S. 101, and the companion cases. For these cases, which held that community property income could be divided equally between husband and wife for tax purposes, did not involve transfers to the wife by the husband. The theory of these cases was that the wife's share of the community property was never owned by the husband but that ownership vested immediately in her at the time of acquisition. The opinion in the *Seaborn* case carefully distinguished *Corliss v. Bowers,* 281 U. S. 376, and *Lucas v. Earl,* 281 U. S. 111, in both of which a husband's transfer of corpus or income was held ineffective to relieve him from the tax on the whole income. It was necessary for the Court to deal with these decisions because of the similarities between the husband's position in these cases and the husband's position under the law of the community property states; absent such similarities, there would have been no need to refer to them. The *Court* distinguished the *Corliss* case on the ground (282 U. S. at p. 117):

> But here the husband never has ownership. That is in the community at the moment of acquisition.

Likewise, the Court distinguished the *Earl* case with the comment (282 U. S. at p. 117):

> The very assignment in that case was bottomed on the fact that the earnings would be the husband's property, else there would have been nothing on which it could operate. That case presents quite a different situation from this, because here, by law, the earnings are never the property of the husband, but that of the community.

The community property decisions of the Supreme Court thus tend to emphasize rather than minimize the im-

portance of a transfer. They do not conflict in any sense with our position in the instant case, and on the contrary, underscore the emphasis which we place on the transfer involved here.[9]

B. The Benefits and Powers Reserved to the Decedent Under the Transfer of May 23, 1929.

The agreement of May 23, 1929, purported to reserve to the husband the benefits and powers over his separately-owned property and the community property acquired prior to July 29, 1927, which were given him by statute in the community property acquired subsequent to July 29, 1927. We, therefore, look to the community property law of California as it existed during the period from May 23, 1929, to December 28, 1930 (the date of decedent's death), in order to determine the benefits and powers *reserved* to the husband under this *transfer*. Consistent with the facts of the present case, we assume that the community property in each instance is traceable to the husband's earnings.[10]

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[9]At the same time, we believe that *Poe v. Seaborn, supra,* and companion cases (upon which *United States v. Malcolm, supra,* in turn, was based) attached too little significance to the substantial benefits and powers possessed by the husband. Those cases involved the sections of the income tax laws which imposed a tax on "the net income of every individual." Those sections, unlike the sections of the estate tax law involved in the instant case, refer to the taxpayer's "ownership" (282 U. S. at p. 9) of the income. Even so, the mechanical approach utilized in these community property cases seems inconsistent with both the previous and subsequent decisions of the Supreme Court. See the second ground of decision in *United States v. Robbins,* 269 U. S. at pp. 327-328, and *Helvering v. Clifford,* 309 U. S. 331. Randolph Paul would seem to be guilty of no overstatement when he observes that "only a bold person" would assert that *Poe v. Seaborn* would be decided the same way, as a matter of first impression, by the present Supreme Court. See I Paul, Federal Estate and Gift Taxation (1942) 62.

[10]The citations which hereafter appear are, of course, in no sense exhaustive. We might have contented ourselves with citation of the recent case of *Grolemund v. Cafferata,* 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612, for most of the propositions stated.

1. In the words of the statute, the respective interests of the husband and wife in community property during the marriage relation are "present, existing and equal interests." Civil Code, Section 161a, enacted in 1927. [Appendix, *infra.*] But this language is followed immediately by the proviso—

> under the management and control of the husband as is provided in section 172 and 172a of the Civil Code.

These later sections, together with Sections 167 and 171a [Appendix, *infra*], relating to the wife's contracts and torts, all of which are of long standing, establish the framework of the benefits and powers reserved to the husband during the marriage.

2. The control and management of community property, both real and personal, is vested exclusively in the husband and is exercisable by him in his sole discretion, subject only to certain specific statutory safeguards designed to protect the wife. Civil Code, Sections 172 and 172a [Appendix, *infra*]; *Grolemund v. Cafferata,* 17 Cal. (2d) 679, certiorari denied, 314 U. S. 612; *Stewart v. Stewart,* 199 Cal. 318, 204 Cal. 546; *Spreckels v. Spreckels,* 116 Cal. 339. Thus, the husband may at his election divest the wife of her interest in any specific item or in all of the community personal property (excepting home furnishings and the wife's and minor children's wearing apparel) simply by disposing of it for a valuable (although not necessarily adequate) consideration. Civil Code, Section 172. He may not sell or mortgage the community real property unless his

wife joins[11] with him, but he is free at his own election and without her consent to lease such real property for successive periods not exceeding one year. Civil Code, Section 172a. Moreover, a purchaser or mortgagee taking in good faith without knowledge of the marriage relationship from a husband who holds a record title to community real property is presumed to acquire a valid title; and if the wife is to protect her interests following such a transaction she is charged with prompt action. Civil Code, Section 172a. If his wife consents, a husband may make a gift of any community property. Civil Code, Sections 172 and 172a. The wife, on her part, is powerless to convey, encumber or lease the property, real or personal. Civil Code, Section 167; *Smedberg v. Bevilockway,* 7 Cal. App. (2d) 578.

3. As a corrollary of these powers of management and control, the husband is not liable to his wife for mismanagement, negligence, or extravagance. It is true that he may not dissipate the assets by making gifts (*Johnson v. United States,* 135 F. (2d) 125 (C. C. A. 9th)), but community assets may be dissipated in other ways and the wife has no redress. Whether he congenitally buys the wrong stock, bets on the wrong horse, or nourishes a taste for high living far exceeding his wife's wishes, no remedy is conferred upon her either by statute or court decision. If the husband accumulates any property he does so voluntarily. See *Spreckels v. Spreckels,* 116 Cal. 339, 345; *Garrozi v. Dastas,* 204 U. S. 64; *United States v. Robbins, supra.*

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[11]Strictly speaking, the wife probably does not join with the husband in conveying real property but merely gives "an expression of her assent" to the conveyance. See *Riley v. Gordon,* 137 Cal. App. 311, 315-316, which dealt with pre-1927 community property. The husband and wife do not hold community property as tenants by the entirety. See Civil Code, Section 161, Appendix, *infra.*

4. The husband's debts and other liabilities, whether or not they arise out of any activity of benefit, or intended to be of benefit, to the community, may be discharged from community property, both real and personal. The husband's duty to support his wife and minor children does not rest on the community property statutes, but he may discharge this obligation either from his separately-owned property or from the community property. At his sole election, a husband may dispose of community personal property in order to satisfy contractual, tort or statutory liability incurred by him alone, and it seems to follow that he has the same right with respect to real property. At any rate, it is settled that on judgment and execution a victim of the husband's negligence can reach community property, both real and personal, in order to satisfy the liability incurred, and that the wife is powerless to protect her "present, existing and equal" interest in it. *Grolemund v. Cafferata, supra; Brunvold v. Victor Johnson & Co.,* 138 P. (2d) 32 (Cal.), See *Altramano v. Swan,* 20 Cal. (2d) 622. 629. The liabilities of the wife, on the other hand, even though arising from tort or statute, may not be satisfied from community property, except to the extent that such property is traceable to her own earnings. *Grolemund v. Cafferata,* 17 Cal. (2d) at pp. 684-685; *Grace v. Carpenter,* 42 Cal. App. (2d) 301. In cases of transfers from the husband of separately-owned and old-type community property purchased with funds earned by him, such as here, this last provision is obviously of no consequence.

Conversely, the liability of the husband, when acting for the benefit of the community, is not limited to that

of a common law agent or trustee when dealing with third persons.[12] The husband's separately-owned property, as well as the community property, may be reached in satisfaction of such obligations. See *Spreckels v. Spreckels, supra; Hulsman v. Ireland,* 205 Cal. 345. But the separate earnings of the wife, though community property, may not be applied in satisfaction of debts contracted by the husband even though for the benefit of the community. *Street v. Bertolone,* 193 Cal. 751.

5. Against this background, it would be indeed remarkable if it could properly be said that the wife is entitled equally with her husband to the possession of community property. To the contrary, it seems well settled that, *as a concomitant of his powers of management and control,* the husband is entitled to the exclusive possession of the community property. *People v. Swalm,* 80 Cal. 46; *Fennell v. Drinkhouse,* 131 Cal. 447; *Estate of Dargie,* 179 Cal. 418; *McMullin v. Lyon Fireproof Storage Co.,* 74 Cal. App. 87, 92-93; *Salveter v. Salveter,* 135 Cal. App. 238; *Beemer v. Roher,* 137 Cal. App. 293. See Civil Code, Section 1402 [Appendix, *infra*], referring to the husband's right of possession as against the deceased wife's personal representative. If theory be resorted to, it appears that a wife's physical possession, when she has it, is the husband's legal possession. *People v. Swalm,* 80 Cal. at pp. 49, 50. As a general rule, it is the husband alone who may sue to recover the possession of community property, and assert rights respecting it. *Chance v. Kobsted,* 66 Cal.

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[12]California does not recognize any legal entity separate and distinct from the parties comprising the community. *Jones v. Weaver,* 123 F. (2d) 403 (C. C. A. 9th); *Grolemund v. Cafferata, supra.*

App. 434. During her husband's lifetime, a married woman is neither a necessary nor a proper party to such an action. See *Spreckels v. Spreckels,* 116 Cal. at p. 349; *Caputo v. Fusco,* 54 Cal. App. 191; *La Rosa v. Glaze,* 18 Cal. App. (2d) 354.

6. The respective rights of the husband and wife upon the death of one of them are governed by Sections 1401 and 1402 of the Civil Code (now Sections 201, 202 and 203 of the Probate Code). In general, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent and, absent such disposition, goes to the surviving spouse. But there is an important qualification in the case of community property passing from the control of the husband, whether by reason of his death or the testamentary disposition of the wife as to her share. Such property, while not liable for the wife's debts (*Estate of Klumpke,* 167 Cal. 415), remains subject to the husband's debts, the family allowance and the charges and expenses of administration. Thus, upon the husband's death, the wife takes as her share of the community property only the residue remaining after such charges have been satisfied. And, even though the separate property of the husband or his share of the community property is sufficient to satisfy these charges, they are nevertheless apportioned *pro rata* between his property and the wife's share of the community property. *Estate of Coffee,* 19 Cal. (2d) 248.

Grolemund v. Cafferata, supra, and *Estate of Coffee, supra,* are of unusual significance because they were decided as late as 1941, subsequent to the decision of this Court in *United States v. Goodyear, supra,* and be-

cause they are the first pronouncements of the Supreme Court of California as to the effect of the 1927 amendment. As indicated above, *Grolemund v. Cafferata, supra,* held that community property, both real and personal, can be sold on execution to satisfy a judgment secured against a husband alone in consequence of his tort (negligent operation of an automobile), and *Estate of Coffee, supra,* held that the share of the community property passing to the surviving wife upon the death of the husband is the net property remaining after the husband's debts, the family allowance and the expenses of administration have been satisfied.

The *Grolemund* opinion stated that fundamental to the determination of the case was the question of the changes wrought in the community property system by the enactment of Section 161a of the Civil Code in 1927. 17 Cal. (2d) at p. 682. The opinion considered the community property system at many points and concluded in each instance that the 1927 amendment had made no change. The "present, existing and equal" interest conferred upon the wife by the 1927 amendment was brushed aside as of little significance since, as the court pointed out, the community property still remained subject to the "management and control" of the husband as provided by Sections 172 and 172a. The court concluded (p. 689) that Section 161a had "not altered the situation with respect to the wife's interest remaining subject to the husband's power of management and control * * *." It recognized that the husband thereby retained the power to divest the wife of her interest in community property. In the course of its discussion, the court cited with approval (p. 687) the original "decision" of the court below in the instant case and twice

referred to the court's opinion, quoting a passage from it (pp. 687 and 698). It emphasized (p. 687) that the provision making the entire community property subject to the husband's debts when it passed from his control by reason of his death or by virtue of testamentary disposition by the wife, was "antagonistic" to the theory that Section 161 (a) gave the wife a vested interest, which no act of the husband could affect. The court also cited with approval *Smedberg v. Bevilockway, supra,* for its implicit holding that the effect of Section 161a was not to change the nature of the wife's interest in community property into a vested interest (pp. 685-686).[13] Finally, referring to *United States v. Malcolm,* 282 U. S. 792, the court stated (p. 689) that this decicision expressed the prevailing view of the federal courts to the effect that a California wife has such a present and vested interest in the community property that she may file a separate income tax return; the court added, however, that this could have no bearing on the question at issue.

The opinion in *Estate of Coffee, supra,* likewise failed to point to any change made in the community property system by the 1927 amendment and, in fact, did not even mention Section 161a. This opinion also quoted with approval (19 Cal. (2d) at p. 252) from the opinion of the court below in the instant case (although that opinion

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[13]In *Brunvold v. Victor Johnson & Co., supra,* the District Court of Appeal referred to the wife's as a "vested interest" (138 P. (2d) at p. 35), and in so doing seems to have exceeded the limits of the *Grolemund* opinion. In view of the management and control plainly reserved to the husband, we do not attach importance to this point. However, it may be noted that the court used the expression "vested interest" in answering the appellant's argument that the result reached in favor of the judgment creditor was unconstitutional. The burden of the court's answer was that even if the wife had a vested interest, still the legislature could constitutionally impose the condition that the property should be subject to the husband's debts.

had then been withdrawn for a period of some eleven months).

It will be recalled that the decision of the Supreme Court in *United States v. Malcolm, supra,* holding that a California wife has such an interest in the community poperty income that she might separately report and pay a tax on one-half of it, issued on the Government's concession that the amendments to the California community property law not involved in *United States v. Robbins,* 269 U. S. 315 (which was concerned with community property acquired prior to 1917), justified this result. This concession was thought to be required by the subsequent amendments to the California law and the decision in *Poe v. Seaborn,* 282 U. S. 101, which held that the wife's interest in community property in the State of Washington was a *vested* interest, and the other cases decided at the same time as the *Seaborn* case. In the light of the two recent decisions of the Supreme Court of California, it may be questioned whether the Government's concession in the *Malcolm* case was providently made and whether the decision of the Court has continuing vitality.[14] In this connection, it must be borne in mind that the amendments to the community property law of 1917 and 1923 did not convert the interest of the wife into something more than an expectancy. This Court recognized that that was so in the *Goodyear* decision. As to the 1917 amendments (requiring the wife to join in conveyances of real estate, etc.), see *Stewart v. Stewart, supra.* As to the 1923

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[14]But see *Commissioner v. Cavanagh,* 125 F. (2d) 366, 368, in which this Court stated that "The *Grolemund* case in no manner touches the principles leading to the *Malcolm* decision."

amendment (giving the wife the right of testamentary disposition over her share of the community property, etc.), see *Trimble v. Trimble,* 219 Cal. 340; *Spreckels v. Spreckels, supra,* p. 344; and *Gillis v. Welch,* 80 F. (2d) 165 (C. C. A. 9th), certiorari denied, 297 U. S. 722. In the last-cited case it was held that upon a gift by a husband to his wife of community property acquired in 1924 a federal gift tax was payable on the full value of the property.[15] Thus it will be seen that both the *Malcolm* and *Goodyear* decisions apparently rest on nothing more substantial than the 1927 amendment to the community property law.

As we have pointed out, however, we do not challenge the *Malcolm* decision, which did not involve estate taxes and was not concerned with transfers. It suffices to say that the two recent decisions of the California Supreme Court do warrant a re-examination of the references to the community property law set out in the *Goodyear* opinion.

The *Goodyear* opinion placed emphasis on the circumstance that under Section 161 (a) the transfer was effective to confer upon the wife a "present, existing and equal interest" in the community property (99 F. (2d) at pp. 526-527), but this statutory phrase must be construed in conjunction with other provisions of the community property law. When those are given effect, it

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[15]This case involved a gift of 1923-1927 community property to the wife, who thereafter held the subject of the gift "as a part of her separate estate" (80 F. (2d) at p. 167). The nature of the gift is thus to be carefully distinguished from the instant gift, which served to convert the husband's separately-owned property and pre-1927 community property into post-1927 community property. In our view, the subject property of the instant gift remained liable for the estate tax on decedent's death, and, by the same token, would not have been liable for a gift tax. See *Estate of Sanford v. Commissioner,* 308 U. S. 39. *Cf. Smith v. Shaughnessy,* 318 U. S. 176.

is clear that her interest is not a present and existing interest in the same sense that the husband's interest is a present and existing interest. That their interests are not equal in all respects, is also clear. This Court recognized in the *Goodyear* case that the community property remains subject to the management and control of the husband after Section 161 (a) was enacted (p. 527). The interest given to the wife under Section 161(a) is circumscribed by this fact. As we have seen, the recent California decisions strongly imply that the sections merely attached a label to the wife's interest without significance, at least as far as the husband's management and control are concerned. The equality of ownership between them, therefore, can only extend to some kind of a technical ownership. The *Goodyear* opinion further stated (p. 527) that by force of the transfer, both "spouses had possession and enjoyment of the property and owned the income therefrom." No California cases were cited for the proposition that the wife, equally with the husband, had possession or enjoyment of the community property. The provisions giving the husband management and control negative any such theory and the situations which appear in Paragraph 5, *supra*, indicate that in making this statement also the Court was using the terms "possession" and "enjoyment" in a technical sense and not in the sense of actual possession and enjoyment. This conclusion is strengthened by the fact that later in the opinion, the Court asserted only (p. 527) that—

> We think that *theoretically* each spouse had possession and enjoyment of his particular interest. [Italics supplied.]

Whatever "ownership" interest may be said to have been conferred upon the wife by Section 161 (a) and whatever possession and enjoyment may be said to have been given her, she may be deprived of that interest and ousted from that possession and enjoyment without her consent and against her wishes in consequence of her husband's actions. *Grolemund v. Cafferata, supra; Estate of Coffee, supra.* See *Hannah v. Swift,* 61 F. (2d) 307 (C. C. A. 9th).

Both Judge Stephens, dissenting in the *Goodyear* case (99 F. (2d) at p. 532), and Judge Jenney in his original opinion in the present case (23 F. Supp. at p. 280) expressed the view that the effect of the 1927 amendment was to give the wife an "ownership interest" or the "enjoyment of ownership" in one-half of the community property. We may assume that this was the result of that amendment, giving these words the significance attributed to them by their authors. But this change is wholly immaterial for present purposes. Judge Stephens, probably, and Judge Jenney, expressly, took the view that this did not give the wife a greater possessory interest than she had before 1927. In the words of Judge Jenney, referring to the situation after the 1927 amendment (23 F. Supp. at p. 280):

> The Legislature must have wanted to endow the wife in the present with rights of ownership which would be more than merely expectant but would be existent—such that they would not be subordinate but would be equal to the husband's. *The possession, management, and control, and the right to alienate or hypothecate, remained solely in the husband;* the bare legal title, the right of ownership as now defined, was divided equally between the spouses. [Italics supplied.]

Upon this examination of the benefits and powers reserved to the husband under the transfer, we turn to the application of the federal estate tax.

C. The Application of Section 302 (c) and (d).

Prior to the 1927 amendment, the husband retained such an aggregate of advantages with respect to California community property as to require the inclusion of its full value in his gross estate. See *Gillis v. Welch, supra,* and other cases cited above. Although the Supreme Court of California has not said so, we may assume that the effect of the 1927 amendment was to vest in the wife an "ownership" interest equal to that of the husband in the community property thereafter acquired. At the same time, the 1927 amendment did not affect the husband's management or control of the community property or the other substantial rights of the parties in regard to it. Assuming, upon the husband's death, that the 1927 amendment was effective to withdraw the wife's share of the community property from the scope of Section 302 (a), it is still necessary to deal with Section 302 (c) and (d) in transfer cases, such as the present. The application of the latter subsections is not frustrated by the fact that a legal interest has been vested in a grantee prior to the decedent's death; they are not concerned with the refinements of legal title, but with the substance of possession, control and enjoyment. The inquiry under these subsections is directed to the question whether the disposition of the substantial incidents of ownership has been held in suspense until the decedent's death. *Helvering v. Hallock, supra.* Even other sections of the revenue laws, which do not in ex-

press terms deal with transfers, are concerned less with the technicalities of legal title than with the substantial control, advantages and satisfactions which go with the concept of ownership. *Harrison v. Schaffner,* 312 U. S. 579; *Helvering v. Eubank,* 311 U. S. 122; *Helvering v. Horst,* 311 U. S. 112; *Helvering v. Clifford,* 309 U. S. 331. But the 1927 amendment leaves these vital considerations untouched. Consequently, it seems almost capable of mathematical demonstration that a transfer such as that involved in the instant case is insufficient to exclude the full value of the transferred property from the decedent's gross estate.

Apart from the foregoing sequence of cases and amendment, it seems clear that the instant case falls within Section 302 (c) and (d). Under Section 302 (c) the full value of the property is taxable where "possession" is retained by the transferor. As we have seen, the decedent's reservation of his powers of management and control over the transferred property carried with it the exclusive right to possession.[16] We do not think that the wife even "theoretically" had a right to possession. But if she did, under some concept foreign to the common law meaning of possession,[17] it was the kind of technical interest irrelevant to the application of Section 302 (c) and (d). *McCaughn v. Girard Trust Co.,* 11 F. (2d) 520 (C. C. A. 3d); *Holland v. Commissioner,* 47 B. T. A. 807 (Supplemental opinion), 1 T. C. 564. See *Common-*

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[16]On the facts of the present case there can be no doubt that decedent in fact retained possession, as well as the right to possession. [R. 207-208.]

[17]In the common law sense, it is impossible to define "possession" except in terms of "control." See 1 Restatement, Property (1936), Section 7; 1 Restatement, Torts (1934), Sections 157 and 216. Surely "possession" as used in Section 302 (c) should not be given a narrower and more technical meaning than at common law.

wealth Trust Co. v. Driscoll (W. D. Pa.), decided January 28, 1943 (1943 Prentice Hall, Par. 62,452), affirmed *per curiam* by the Circuit Court of Appeals for the Third Circuit July 9, 1943 (1943 Prentice Hall, Par. 62,749), taxpayer's petition for rehearing now pending.

It is perhaps even clearer that the wife's "enjoyment" of the transferred property was held in suspense during decedent's lifetime, and did not become fixed until his death. As we have seen, decedent during his lifetime could divest the wife completely of her "ownership" interest in any part or all of the community property, which could be applied in satisfaction of his own personal obligations. Even after his death, the community property remained liable for his debts and the residue finally placed at the full disposal of the wife could be determined only after all such obligations were satisfied.

In the *Hallock* case the decedent had created a trust under a separation agreement, giving the income to his wife for life and providing that upon her death the trust should terminate and the corpus should be paid to him if he survived and if not, should be paid to others. When the settlor died in 1932 his divorced wife, the life beneficiary, survived him. The Circuit Court of Appeals had held that the trust instrument had conveyed the whole interest of the decedent subject only to a condition subsequent, which left him nothing except a mere possibility of reverter and hence, that the value of the remainder could not be included in the gross estate, as a transfer intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302 (c) of the Revenue Act of 1926.

The Supreme Court rejected the argument that the decision should turn on the nature of the remainder in-

terest, and instead approved the principle established in *Klein v. United States,* 283 U. S. 231, where the court had said (at p. 234) that the test was whether or not "the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living." The court added that the rationale of the *Klein* decision was that the statute taxes not merely those interests which are deemed to pass at death according to the refined technicalities of the law of property, but also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise. Section 302 (c) applied, since the grantor retained in himself the possibility of regaining the transferred property.

The case is squarely within the *Hallock* case, since the decedent's death was the indispensable condition which assured the wife's possession and enjoyment of any part of the property included in the transfer. If there is a distinction, on the facts, the instant case is a stronger case than the *Hallock* case, where the decedent's death could not affect the life estate previously transferred, and the husband reserved none of the rights of management and control which were vested in the decedent here.

Applying the *Hallock* rule, many cases have held Section 302 (c) applicable where the power of the decedent to invade the corpus of the transferred property or to divert it to others was far more rigidly limited than in the present case. *Blunt v. Kelly,* 131 F. (2d) 632 (C. C. A. 3d); *Bankers Trust Co. v. Higgins* (C. C. A. 2d), decided June 18, 1943 (1943 Prentice Hall, Par. 62,707);[18]

[18]This case also involved a complicated problem of valuation not presented in the instant case.

Lehman v. Commissioner, 109 F. (2d) 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637; *Brewer v. Hassett* (Mass.), decided February 24, 1943 (1943 Prentice Hall, Par. 62,520). See *Durant v. Commissioner,* 41 B. T. A. 462. Also see, as to the application of Section 302 (c), *Commissioner v. Clise,* 122 F. (2d) 998 (C. C. A. 9th), certiorari denied, 315 U. S. 821; *Mearkle's Estate v. Commissioner,* 129 F. (2d) 386 (C. C. A. 3d).

Decedent was under a duty to support his wife and any minor children. This obligation did not arise by virtue of the community property system, but could have been satisfied either out of his own property or community property. Even assuming, although there is no basis for the assumption, that some identifiable portion of the community property was earmarked for the support of the wife, this would not alter the result. To the extent that the corpus of the community property transferred was dedicated to the wife's support, it was used to satisfy a legal obligation of the decedent, and was thus includible in his gross estate under the analogy of *Douglas v. Willcuts,* 296 U. S. 1. See *Helvering v. Mercantile-Commerce Bank & Trust Co.,* 111 F. (2d) 224 (C. C. A. 8th), certiorari denied, 310 U. S. 654. *Cf. Helvering v. Stuart,* 317 U. S. 154, 169-171, rehearing denied, 317 U. S. 711.

Indeed, it is reasonable to argue that even apart from the elements of management and control, possession and enjoyment, the transferred property falls under Section 302 (c). For the transfer was subject to the contingency that the wife's share of the community property should revert to the decedent if she predeceased him intestate. It seems correct, in principle, that the degree of remoteness of the reversion to the decedent does not frustrate the application of the *Hallock* principle. In an analogous sit-

uation, where the reversion was dependent upon death intestate, the Board of Tax Appeals has held Section 302 (c) applicable. *Lloyd v. Commissioner,* 47 B. T. A. 349, now pending decision before the Circuit Court of Appeals for the Third Circuit. We mention this as a valid ground of decision without placing primary reliance upon it in the instant case.

Similarly, the instant case falls well within the scope of Section 302 (d). The decedent here retained a right to alter, amend and revoke the disposition of the property included within the transfer. Section 302 (d), however, is still broader and encompasses the situation where the right to alter, amend or revoke is reserved "by the decedent alone or in conjunction with any person." The term "any person" includes a beneficiary of the transfer. *Helvering v. City Bank Co.,* 296 U. S. 85. We have seen that the decedent could even make gifts of the community property, real and personal, with the consent of his wife and without her consent, he may by other means than making gifts divest her of her interest in community property. The following cases require the inclusion of the full value of the transferred community property within the decedent's gross estate: *Helvering v. City Bank Co.,* 296 U. S. 85; *Porter v. Commissioner,* 288 U. S. 436; *Welch v. Terhune,* 126 F. (2d) 695 (C. C. A. 1st), certiorari denied, 317 U. S. 644; *Howard v. United States,* 125 F. (2d) 986 (C. C. A. 5th); *Mellon v. Driscoll,* 117 F. (2d) 477 (C. C. A. 3d), certiorari denied, 313 U. S. 579; *In re Tyler's Estate,* 109 F. (2d) 421 (C. C. A. 3d); *Adriance v. Higgins,* 113 F. (2d) 1013, 1015 (C. C. A. 2d); *Dort v. Helvering,* 69 F. (2d) 836, 841 (App. D. C.); *Commonwealth Trust Co. v. Driscoll, supra.* Also see *Chase Nat. Bank v. United States,* 278 U. S. 327, 335; *Reinecke v. Northern Trust Co.,* 278 U. S. 339,

345; *Saltonstall v. Saltonstall,* 276 U. S. 260, 271; *Tyler v. United States,* 281 U. S. 497.

In summary, under the provisions of the transfer now before the Court, it was the decedent's death which "brought into being or ripened for the survivor" (*Tyler v. United States,* 281 U. S. at p. 503) "property rights * * * which before could not be exercised" (*Title Insurance & Trust Co. v. Goodcell,* 60 F. (2d) at p. 804). It was decedent's death which passed to the wife the "valuable assurance" (*Porter v. Commissioner,* 288 U. S. at p. 444) that she would not be divested of the interest transferred to her *inter vivos.* Decedent's death was the "indispensable and intended event" (*Klein v. United* States, 283 U. S. 231, 234) which "freed" the wife's interest from the "contingency" (*Helvering v. Hallock,* 309 U. S. at p. 113) that she might never reduce it to possession and enjoyment. The full value of the property should therefore be included in decedent's gross estate under Section 302 (c) and (d).

Conclusion.

For these reasons the judgment of the District Court should be reversed.

Respectfully submitted,

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August, 1943.

APPENDIX.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise * * * intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * * * *

Civil Code of California (1929):

Sec. 161. [*Joint tenants.*] A husband and wife may hold property as joint tenants, tenants in common, or as community property. [Enacted 1872.]

Sec. 161a. [*Respective interests; community property.*] The respective interests of the husband and wife in community property during continuance of the marriage rela-

tion are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in community property. [Enacted 1927.]

Sec. 167. [*Wife's contract, community property.*] The property of the community is not liable for the contracts of the wife, made after marriage, unless secured by a pledge or mortgage thereof executed by the husband. [As amended in 1874.]

Sec. 171a. [*Torts.*] For civil injuries committed by a married woman, damages may be recovered from her alone, and her husband shall not be liable therefor, except in cases where he would be jointly liable with her if the marriage did not exist. [Enacted 1913.]

Sec. 172. [*Community personal property.*] The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he can not make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife. [As amended in 1917.]

Sec. 172a. [*Community real property.*] The husband has the management and control of the community real property, but the wife, either personally or by duly authorized agent, must join with him in executing any instrument by which such community real property or

any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that nothing herein contained shall be construed to apply to a lease, mortgage, conveyance, or transfer of real property or of any interest in real property between husband and wife; provided, also, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid. No action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, executed by the husband alone, shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate, and no action to avoid any instrument mentioned in this section, affecting any property standing of record in the name of the husband alone, which was executed by the husband alone and filed for record prior to the time this act takes effect, in the recorder's office in the county in which the land is situate, shall be commenced after the expiration of one year from the date on which this act takes effect. [As amended in 1927.]

Sec. 1401. [*Distribution of common property, death of wife.*] Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of section one thousand four hundred two of this Code. [As amended in 1923; now Section 201, Probate Code of California.]

Sec. 1402. [*Same. Death of husband.*] Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to administration, his debts, family allowance and the charges and expenses of administration; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect. After forty days from the death of the wife, the surviving husband shall have full power to sell, lease, mortgage or otherwise deal with and dispose of the community real property, unless a notice is recorded in the county in which the property is situated to the effect that an interest in the property, specifying it, is claimed by another under the wife's will. [As amended in 1923; now Sections 202 and 203, Probate Code of California.]

Treasury Regulations 70 (1929 Ed.):

Art. 15. *Transfers during life.*—Except bona fide sales for an adequate and full consideration in money or money's worth, all transfers made by the decedent subsequent to September 8, 1916, are taxable if made in contemplation of or intended to take effect in possession or enjoyment at or after his death. If the enjoyment of the property or the interest transferred (whether the property or the interest was transferred by the decedent before or after passage of the Revenue Act of 1916) was subject at the date of the decedent's death to change by

the exercise of any power to alter, amend, or revoke, * * * the entire value of the property, or the interest transferred, as of the date of decedent's death must be included in the gross estate unless the transfer constituted a bona fide sale for an adequate and full consideration in money or money's worth. * * *

Art. 17. *General.*—All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as a part of the gross estate.

Art. 19. *Power to change enjoyment.*—The value of property transferred, other than by a bona fide sale for an adequate and full consideration in money or money's worth, constitutes a part of the gross estate if at the time of the decedent's death the enjoyment thereof was subject to any change through a power, exercisable either by the decedent alone or in conjunction with any person, to alter, amend, or revoke.

Treasury Regulations 105, promulgated under the Internal Revenue Code:

Sec. 81.17. *Transfers conditioned upon survivorship.*—The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property

transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remainder, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred

in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate. If by reason of an election by the executor the valuation of the gross estate is governed by the provisions of section 81.11, adjustments in the values of such transferred estates may be required. (See section 81.15.)

Where the transfer was made during the period between November 11, 1935 (that being the date upon which the Supreme Court of the United States rendered its decisions in the cases of *Helvering v. St. Louis Union Trust Co.* (296 U. S., 39) and *Becker v. St. Louis Union Trust Co.* (296 U. S., 48)), and January 29, 1940 (that being the date upon which such Court rendered its decisions in *Helvering v. Hallock* and companion cases (309 U. S., 106)), and the Commissioner, whose determination therein shall be conclusive, determines that such transfer is classifiable with the transfers involved in such two cases decided on November 11, 1935, rather than with the transfer involved in the case of *Klein v. United States* (283 U. S., 231), previously decided by such Court, then the property so transferred shall not be included in the decedent's gross estate under the provisions of this section, if the following condition is also met: Such transfer shall have been finally treated for all gift tax purposes, both as to the calendar year of such transfer and subsequent calendar years, as a gift in an amount measured by the value of the property undiminished by reason of a provision in the instrument of transfer by which the property, in whole or in part, is to revert to the decedent should he survive the donee or another person, or the reverting thereof is conditioned upon some other contingency terminable by decedent's death.

No. 10434

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOSEPHINE WELCH OVERTON, as Executrix of the Estate of Galen H. Welch, deceased, formerly Collector of Internal Revenue for the Sixth Collection District of California,

Appellant,

vs.

MAE H. SAMPSON, individually and as Executrix under the will of W. O. SAMPSON, deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Questions Involved.

1. DID THE AMENDMENT IN 1927 TO THE CALIFORNIA CIVIL CODE, §161 (a) CONFER UPON THE WIFE, DOMICILED IN CALIFORNIA, SUCH AN INTEREST IN CALIFORNIA COMMUNITY PROPERTY AS WARRANTED THE EXCLUSION OF HER INTEREST IN THE COMMUNITY PROPERTY FROM THE ESTATE OF THE HUSBAND FOR FEDERAL ESTATE TAX PURPOSES?

2. UNDER THE LAW OF CALIFORNIA MAY A HUSBAND DOMICILED IN CALIFORNIA, BY AGREEMENT TRANSMUTE PROPERTY FROM ONE TYPE INTO ANOTHER TYPE?

3. Did the appellee acquire under the terms of the agreement dated May 23, 1929, between herself and her husband such an interest in their property as to entitle her to have her one-half of the community property excluded in computing the Federal estate tax on her deceased spouse's estate?

Statutes and Regulations Involved.

In addition to the statutes set forth in the Appellant's Brief there is included in the Appendix annexed hereto a copy of Sections 401 and 402 of the Revenue Act of 1942, and §158 of the California Civil Code.

Statement.

The appellee would like to supplement the statement set out in the Appellant's Brief as follows:

The decedent was Secretary and Treasurer of Bullock's [R. 197]. He attended business every day and worked long hours. He was taken ill about the 15th or 16th of November, 1930 [R. 198]. He was in good health at the time the agreement of May 23, 1929, was made [R. 197]. The decedent died of Lobar pneumonia [R. 199] on the 28th day of December, 1930 [R. 193]. In the early part of November, 1930, the decedent took out $30,000 of life insurance in the New England Mutual Life Insurance Company [R. 203].

The case was tried before Hon. Albert Lee Stephens on December 14, 1936, without a jury [R. 119]. It was then transferred to the Hon. Ralph E. Jenney, who, on the 30th day of April, 1938, handed down an extensive opinion, which was vacated by Judge Jenney of his own motion under date of January 9, 1941 [R. 49].

ARGUMENT.

I.

Section 161 (a) of the Civil Code of California Gives the Wife a Vested Interest in Community Property Acquired After the Effective Date of Its Adoption.

The Appellant's Brief devotes a great deal of space to reviewing authorities which treat of the nature of community property owned by spouses domiciled in California before July 29, 1927.

In 1926 the Supreme Court of California, in the case of *Stewart v. Stewart,* 199 Cal. p. 318, held in effect that the wife's interest in community property was not vested.

The nature of a wife's interest in California community property had been the subject of considerable litigation and the decisions and rulings of the Treasury Department were far from consistent. Thus in the case of *Wardell v. Blum* (C. C. A. 9), 276 Fed. 226, certiorari denied, 258 U. S. 617, it was held that a wife took a one-half interest in her own right in community property under the 1917 amendment to the California Inheritance Tax Act. This case was decided in 1921. In 1924 the United States Attorney General issued two decisions, one T. D. 3569 III-1 C. B. 91 and the other T. D. 3670 IV-1 C. B. 19, in which it was held that only one-half of the community property was taxable upon the death of the husband. In 1926 the tide flowed in the opposite direction and by T. D. 3891 V-2 C. B. 232 the Treasury Depart-

ment ruled that the community property was taxable in full to the estate of the husband and it was so held by the Ninth Circuit in *Talcott v. United States,* 23 F. (2d) 897 (1928), certiorari denied 277 U. S. 604.

Then came Section 161 (a) of the California Civil Code, which provides that during the continuance of the marriage relation the wife's interest in the community property was a "present, existing and equal interest." See page 1 of Appendix of Appellant's Brief. There had been a good deal of controversy about the wife's right to report one-half of the community income for income tax purposes as well as having one-half of the community property excluded from the husband's estate for Federal estate tax purposes. That the amendment was designed to accomplish this purpose is clearly disclosed by the case of *United States v. Malcolm,* 282 U. S. 792 (1931). This case involved the question of the right of a wife to report one-half of the community income on her separate return. The case went up to the Supreme Court on a certificate from the United States Circuit Court of Appeals for the Ninth Circuit and concerned a husband and wife who were domiciled in California. The Supreme Court answered in the affirmative the following question:

> "Has the wife, under Section 161 (a) of the Civil Code of California, such an interest in the community income that she should separately report and pay tax on one-half of such income?"

In support of its answer the Court cited *Poe v. Seaborn,* 282 U. S. 101; *Goodell v. Koch,* 282 U. S. 118; and

Hopkins v. Bacon, 282 U. S. 122. In the case of *Poe v. Seaborn* the Court arrived at its conclusion upon the ground that a wife had a vested property right in the community property equal with that of her husband. Speaking of the power of the husband over the community property the Court said:

> "The law's investiture of the husband with broad powers by no means negatives a wife's present interest as a co-owner."

The rule in the *Malcolm* case has remained undistributed for a period of twelve years and it has been the practice of the Treasury Department since that decision to accept without question separate returns of husbands and wives domiciled in California, each reporting one-half of the new type community income upon separate returns. The theory of the *Malcolm* case, of course, is that California wives have a vested interest in one-half of the earnings of husbands after July 29, 1927. This also applies to income derived from community property acquired with such earnings. In the present instance the parties entered into an agreement under date of May 23, 1929, by which they converted all of their property under the new type community property.

II.

It Is Immaterial Whether the Property Was Community Property Earned After July 29, 1927, or Was Converted to That Type of Property by the Agreement.

The appellant has attempted to establish some nebulous distinction between the "pre-1927" type of community property and the separate property of the decedent on the one hand, and the new type of community property acquired after July 29, 1927, with earnings made after that date. She admits that one-half of the community property acquired from earnings of the decedent after July 29, 1927, should not be included whereas she earnestly contends that all other property acquired by the decedent should be included in the decedent's estate. There seems to be no question of the right of spouses domiciled in California to convert one type of property into another by agreement. See §158 of the *California Civil Code* [see Appendix]; *Schuler v. Savings Fund & Loan Society,* 64 Cal. 397 (1883); *Title Insurance and Trust Company v. Ingersoll,* 153 Cal. 1 (1908); *Estate of Sill,* 121 Cal. App. 202 (1932) and GCM 669 V-2 C. B. 111.

There seems to be no doubt that the Sampson agreement was effective to convert all property owned by Mr. Sampson into the new type of community property. To hold otherwise would necessitate the overruling of a long line of California cases.

The appellant attempts to differentiate between (a) community property acquired prior to 1927 and separate

property, and (b) community property acquired out of post-1927 earnings. After a metaphysical disquisition upon the subject of control and management of pre-1927 community property, the appellant comes to the conclusion that this control and management requires the inclusion of all of the old type community property in a husband's estate. See pages 17 to 27 Appellant's Brief. This conclusion, of course, is arrived at after the appellant admits that one-half of the post-1927 community property should not be included in the husband's estate, and *yet the decedent's right of control and management over both the old and new type of community property was identical* not only under the terms of the agreement but by virtue of Section 161 (a) of the Civil Code. See *Bank of America National Trust & Savings Association v. Rogan,* 33 Fed. Supp. 183 (1940). Incidentally, the agreement affected not only property owned on May 23, 1929, but all property whether theretofore acquired or thereafter to be acquired.

In discussing the degree of control or management exercised by a husband over community property in California, the appellant overlooked the practical aspect of the relationship of spouses and their property. Ordinarily spouses do not deal with each other with respect to their property at arms length. The terms "mine" and "yours" disappear and they become "ours." It is not an uncommon thing for a husband to exercise the same control and management of his wife's separate property as he does with respect to the community property. Cer-

tainly this would not be a reason for including the wife's separate property or any part of it in the husband's estate. It is submitted that tenuous speculations should not be permitted to destroy the right of a wife under the California law in community property. As was said by the District Court in the case of *Bank of America etc. v. Rogan, supra:*

> "This makes it unnecessary to deal with some of the other theoretical and abstract considerations and arguments as to the nature of community property ownership to be found in the writings of taxation experts and some court decisions. By dissecting our community property law and subjecting it to various categorical tests, one could easily pulverize and reduce to naught the interest of the wife, so as to deprive California wives, for taxation purposes, of the benefits which communal ownership confers upon them. We prefer to deal with realities."

III.

The Agreement of May 23, 1929, Was Not Made in Contemplation of Death.

The lower Court found that the agreement of May 23, 1929, was not made in contemplation of death [R. 96, 101]. This finding is amply supported by the evidence which showed that Mr. Sampson was actively engaged in business up to within six weeks of his death, and less than two months before his death he effected life insurance in the sum of $30,000 upon his life and that the cause of his death was Lobar pneumonia. There was no conflict in the evidence upon the point and it would seem clear that the finding was well founded.

IV.

The Commissioner of Internal Revenue Has Acquiesced in the Case of Bigelow v. Commissioner Following the Goodyear Case.

The judgment in the *Goodyear* case was entered in 1937 by the District Court. This judgment was affirmed on October 18, 1938, by the Circuit Court of Appeals for the Ninth Circuit. No application for certiorari was made. Thereafter the United States Board of Tax Appeals in the case of *Bigelow v. Commissioner,* 39 B. T. A. 635 (1939) followed the *Goodyear* case (99 Fed. (2d) 523), and in the latter part of 1939 the Commissioner of Internal Revenue acquiesced in the decision of the Board in the *Bigelow* case (1942-2 C. B. 2). The significance of this acquiescence will be found in 1941-2 C. B. p. IV as follows:

> "Decisions so acquiesced in should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases before the Bureau."

The Commissioner's acquiescence in the *Bigelow* case apparently has never been withdrawn and it still serves as a precedent in settling estate tax cases involving the same issues now before this Court. As a matter of fact a number of cases involving the identical issue have been settled by the Department in favor of taxpayers.

It might be well at this point to direct the Court's attention to the fact that the agreement in the *Bigelow*

case is practically identical with the Sampson agreement except for a change of names and dates. The Bigelow agreement will be found in 38 B. T. A. 378.

It would not seem unreasonable on the part of the taxpayer to expect the Treasury Department to adopt some consistent position with respect to the question here involved and it is certainly not consistent for the Department to pursue this case with the vigor it has in the face of the acquiescence in the *Bigelow* case.

V.

The Law of the State of the Domicile of the Taxpayer Is Controlling in Determining the Nature of Property Interests for Taxation.

The appellant advances the view that the residents of community property states enjoy tax advantages that "should be restricted in so far as they may be consistent with well settled judicial principles." It is submitted that this can only be interpreted as an invitation to this Court to indulge in judicial legislation. Counsel for the appellant cannot be unaware of the fact that this question as to the so-called advantages of the community property states has been the subject of extensive discussion in Congress for a number of years. The acquiescence of Congress in the *Goodyear* case has not merely been passive. It has repeatedly declined to amend the Revenue Law so as to deprive spouses in community property estates of the right to report community income on separate returns and to have the wife's share of any com-

munity property excluded from the husband's estate for Federal estate tax purposes. It was not until the Revenue Act of 1942 was adopted that Congress took any action to include the wife's share for estate tax purposes. The Act made no change as to income tax on community income. In passing it may be noted that the effectiveness of §401 and §402 of the Revenue Act of 1942 relating to the matter have already been questioned by the Supreme Court of Louisiana June 21, 1943, in the *Matter of Succession of Sam Wiener, Jr.* reported in Prentice-Hall Inheritance and Transfer Tax Service, 11th Edition, par. 1103.

Having failed after years of effort to induce Congress to take some action in the premises, the representatives of the taxing authorities in this case are now seeking to induce this Court to do what Congress has refused to do. If the Court should adopt the contention of the appellant it will necessitate the overruling of the *Goodyear* case, the *Lang* case, the *Bigelow* case, *Poe v. Seaborn, Malcolm* case, *Bank of America v. Rogan* and a number of other cases involving this same point. It would also be necessary to overturn the Treasury Department's own policy of following the *Bigelow* case.

VI.

Congress Has Indicated by the Revenue Act of 1942 That It Has Approved the Exclusion of One-half of the Community Property From the Estate of Husbands Dying Prior to the Effective Date of the 1942 Act.

As hereinbefore pointed out the *Goodyear* case was affirmed in October, 1938. Since then Congress has enacted at least six Internal Revenue laws without changing the rule of the *Goodyear* case in so far as decedents dying before the effective date of the Revenue Act of 1942. Reference to §401 and §402 of the Revenue Act of 1942 seems clearly to indicate that Congress had no intention of abrogating the Goodyear rule retroactively because §402 of the Revenue Act of 1942 is made applicable only to estates of decedents dying after October 21, 1942. This was no mere oversight on the part of Congress. It is a matter of common knowledge that for a number of years the various aspects of community property systems and their relationship to the revenue laws have been the subject of a great deal of discussion in Congress. Even to this day Congress has refused to interfere with the rule as established by the *Malcolm* case of community income for income tax purposes.

VII.

The Case of Helvering v. Hallock Is Not in Point.

The appellant discusses the case of *Helvering v. Hallock,* 309 U. S. 106 and relies heavily on it in support of her contentions. In that case the decedent created a trust under which his wife was a life tenant. The trust provided that if the wife predeceased the husband, the corpus was to go to him, if surviving, if not then to third persons. It is submitted that this state of facts is in no wise comparable to those present in the case at Bar. The *Hallock* case was a five to four decision which overruled two previous five to four decisions which ruled in favor of taxpayers. It will be noted that whatever rights Hallock had in the nature of a reversionary interest in the trust property were created by Hallock himself by the trust indenture. In the present case, Mr. Sampson's interest in the community property, in the event Mrs. Sampson predeceased him, did not flow from the agreement of May 23, 1929, but from §*1401 of the Civil Code* (now §201 of Probate Code), which is a succession statute. Had Mrs. Sampson died testate before Mr. Sampson, there was nothing to prevent her from making a testamentary disposition of all of the property affected by the agreement. See §201 of the Probate Code. Nor could Mr. Sampson bequeath or devise Mrs. Sampson's share of the community property without her acquiescence. In other words Mr. Sampson's rights were derived from the Probate Code and not from the agreement. Mrs. Sampson alone had power to determine whether Mr. Sampson

should receive the property at her death, whereas, in the *Hallock* case the wife had no say as to this.

If the *Hallock* case bears the interpretation urged by the appellant, there never could be an outright gift between closely related persons. Take for example the case of an outright gift by a parent to a child without issue. The child might die intestate and the parent would inherit by reason of the succession laws. This is particularly true if the child happens to be a minor legally incapable of making a will. Does the possibility that a donor may inherit donated property from the donee justify the inclusion of such property in the donor's estate? Yet this is what would happen if the appellant's theory of the *Hallock* case is adopted.

VIII.

The Appellant's Theory of the Case on Appeal Differs From That Upon Which the Case Was Tried.

The Appellant's Brief clearly exemplifies the inconsistent position which the Treasury Department has taken with respect to the question here involved. On page 8 of the brief the appellant makes it clear that the appeal involves only the decedent's separately owned property and "pre-1927" community property. On page 12 of the Appellant's Brief appears the statement:

> "Nor do we contend that the full value of community property acquired with the husband's earnings after July 29, 1927, is includible in his gross estate."

It is believed that this is the first time the appellant has conceded this point in this case. The Commissioner of Internal Revenue rejected the appellee's claim for refund *in toto* and now after more than six years of litigation in which the enormous resources of the United States of America were opposed to the appellee and after the dollar has shrunk appreciably in value, the appellant now admits that even if she is successful on this appeal, a judgment of $680.00 would be proper. See page 2 of Appellant's Brief.

Conclusion.

For the reasons stated above it is respectively submitted that the judgment of the Court below should be affirmed.

FRANK MERGENTHALER,
Attorney for Appellee.

APPENDIX.

Revenue Act of 1942, TITLE IV—ESTATE AND GIFT TAXES

Part I—Estate Tax

SEC. 401. ESTATES TO WHICH AMENDMENTS APPLICABLE.

Except as otherwise expressly provided, the amendments made by this Part shall be applicable only with respect to estates of decedents dying after the date of the enactment of this Act.

SEC. 402. COMMUNITY INTERESTS.

(a) TRANSFERS OF COMMUNITY PROPERTY IN CONTEMPLATION OF DEATH, ETC.—Section 811 (d) (relating to revocable transfers) is amended by adding at the end thereof the following new paragraph:

> "(5) TRANSFERS OF COMMUNITY PROPERTY IN CONTEMPLATION OF DEATH, ETC.—For the purposes of this subsection and subsection (c), a transfer of property held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, shall be considered to have been made by the decedent, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse."

(b) GENERAL RULE.—Section 811 (e) (relating to joint interests) is amended as follows:

(1) By striking out "(e) JOINT INTERESTS.—" and inserting in lieu thereof

"(e) JOINT AND COMMUNITY INTERESTS.—

"(1) JOINT INTERESTS.—".

(2) By inserting at the end thereof the following new paragraph:

"(2) COMMUNITY INTERESTS.—To the extent of the interest therein held as community property by the decedent and surviving spouse under the law of any State, Territory, or possession of the United States, or any foreign country, except such part thereof as may be shown to have been received as compensation for personal services actually rendered by the surviving spouse or derived originally from such compensation or from separate property of the surviving spouse. In no case shall such interest included in the gross estate of the decedent be less than the value of such part of the community property as was subject to the decedent's power of testamentary disposition."

Civil Code of California (1935):

§158. HUSBAND AND WIFE MAY MAKE CONTRACTS. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property, which either might if unmarried; subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts.

No. 10443

United States
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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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CECIL A. EDWARDS,

Assistant Attorney General,
Capitol Building,
Phoenix, Arizona,

Attorneys for Appellees. [3*]

*Page numbering appearing at foot of page of original certified Trancript of Record.

In the United States District Court in and for the District of Arizona.

No. Civ-359 Phx.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G. SCHULTZ,

Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action against the above named defendants, alleges:

I.

That the plaintiff is now and for many years last past, has been a bona fide resident and citizen and practitioner of the healing arts in the State of Arizona; and that plaintiff is the owner of a diploma from the American Academy of Medicine and Surgery, issued June 1, 1927, a copy of which is attached and marked "Exhibit A" and is made a part of this complaint. That the said American Academy of Medicine and Surgery is located at Washington, D. C. and is incorporated as a Medical College under the laws enacted by the United States Congress for the District of Columbia.

II.

That this Court has jurisdiction of this case be-

cause the constitution and laws of the United States are involved.

III.

That the Legislature of the State of Arizona, in 1917, enacted the following statutes regarding the practice of medicine:

"Article 9. Medicine and Surgery. [5]

S.2554. Board of Medical Examiners; appointment; terms; meetings; salary. The governor shall appoint a Board of Medical Examiners consisting of five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practitioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice president, second vice president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the state capitol on the first Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter cogniza-

ble by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (S S 1-2-3-4-5. 13 Ch. 17, L'13 and S.S.; 4733- 4-5-6-7, 4745, R.S. '13; 4734, Am. 73, Ch. 35, L. '22 cons. & rev.) S. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or [6] statement, claim his ability or willingness to, or does diagnosticate, or prognisticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or performs any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians, or of vendors of dental or surgical instrument, apparatus or appliances. Practicing medicine shall include this practice of osteopathy. (S. 6, id. :4738, R.S. '13 rev.) S. 2566. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates on being recorded in the office of the county recorder, shall constitute

the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board, stating [7] that he is the lawful holder thereof and that the same was procured without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma, from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the Eng-

lish language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynocology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five percent upon the general average, and five percent additional for each subsequent ten years of such practice, but must receive not less than fifty percent upon any one subject. The examination papers shall form part of the records of the [8] board and shall be kept on file by the secretary for one year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The Secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application, and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or for-

eign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license, who shall otherwise comply with the provision hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee [9] for reciprocity certificates shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars. (S. 7, id.; 4739, R.S. '13 am., Ch. 66 L'17, Ch. 119, L '21 rev.)

See 20 Cal. Jur. 1056; 21 R.C.L. 352.

That thereafter the Legislature of the State of Arizona in 1935, passed what is commonly called the Basic Science Law to substitute the laws of 1917 which reads as follows:

67-1101 Board of Medical Examiners—Appointment—Term—Meetings—Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said profession respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth for five (5) years and the fifth for six (6) years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner, with, or financially interested in, any college or school of medicine [10] surgery or osteopathy shall be appointed.

The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at the state capitol on the first Tuesday of

January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary, not to exceed twelve hundred ($1200.00) dollars per year, and the compensation of the other members not to exceed ten dollars ($10.00) for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (R.S. 1913, S S 4733-4737, 4745; Laws 1922, Ch. 35, SS 73, p. 174, cons. & rev. RC 1928, SS 2554; Laws 1935, Ch. 99, ss 1. p. 409).

67-1102 Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does diagnosticate or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or performs any operation, or manipulation, or application for compensation therefor, except it be in usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy. (R.S. 1913, ss 4783; Rev. R. C. 1928, ss 2555).

67-1103. Certificates to practice—Requirements of applicants—Examination—Reciprocity certificates—Fees. Three (3) forms of certificates shall be issued by said board, under [11] the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice

medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate to

practice any other system or mode of treatment shall be subject to the above [12] regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstretics, general diagnosis, hygiene. Examination in each subject, shall consist of not less than ten (10) questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five (75) per cent, and not less than sixty (60) per cent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted a credit of five (5) per cent upon the general average, and five (5) per cent additional for each subsequent ten (10) years of such practice, but must receive not less than fifty (50) per cent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or [13] license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona, at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three (3) years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars ($100.00), if the credentials are held insufficient seventy-five dollars ($75.00) shall be returned.

The board may, whenever the services of an ap-

plicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars ($25.00). (R. S. 1913 ss 4739; Laws 1917, Ch. 66 ss 1, p. 98; 'L 1921, Ch. 119, ss 1 p. 264. Rev. R. C. 1928 ss 2556.)

67-11-4. Fee—Records. Each applicant, on making application [14] shall pay a fee of twenty-five ($25.00) dollars, fifteen ($15.00) dollars of which shall be returned if the applicant's credentials are insufficient, or he does not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination. (R. S. 1913, ss 4740, 4741; Cons. & Rev. R. C. 1928 ss 2557.)

IV.

That the defendants, E. J. Cotthelf, Charles C. Bradbury, Charles S. Smith and William G. Schultz, are the members of the Board of Medical Examiners, operating under the Basic Science Laws of 1935.

That J. H. Patterson has, at all times, been the acting Secretary of the said Board of Medical Examiners.

V.

That the defendants and each of them have, for a long period of time, since 1933, repeatedly refused to give the plaintiff an examination for a

license to practice medicine, though often requested.

VI.

Plaintiff alleges that said acts of the Legislature provide that any one, to qualify to take the examination to practice medicine and surgery which reads as follows:

> "To procure a certificate to practice medicine and surgery, the applicant shall file with the board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting of such diploma, not less than those prescribed by the Association of American Medical Colleges for that year." [15]

Plaintiff alleges that the Association of American Medical Colleges is fostered by the American Medical Association, which associations, the Association of American Medical Colleges, and the American Medical Association, is a monopoly, in violation of Section 2, Title 15, of the United States Code, and is in violation of Section 74-101 of the Laws of the State of Arizona. That both Section 2, Title 15 of the United States Code, and Section 74-101 of the Laws of the State of Arizona, prohibit monopolies.

VII.

Plaintiff alleges that, in addition to denying this plaintiff the right to take the examination as a doc-

tor of medicine, defendants and each of them have caused the plaintiff to be arrested and tried in the courts of Maricopa County, Arizona, on a felony charge of practicing medicine without a license, although plaintiff was only treating patients as a naturopathic physician and has a license to practice the art of healing as a Naturopath under the laws of the state of Arizona.

Plaintiff alleges that he was acquitted of said charge of practicing medicine without a license, in the courts of Maricopa County, Arizona; that the defendants, and each of them, have caused numerous damage suits to be filed in the courts of Maricopa County, for malpractice, which suits have been decided in favor of the plaintiff.

VIII.

Plaintiff alleges that the acts complained of against the defendants and each of them, are acts denying this plaintiff the rights guaranteed to him under the 14th Amendment of the Constitution of the United States, which read as follows: [16]

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

IX.

Plaintiff alleges that the acts complained of against the defendants and each of them, are acts constituting compulsary denial to plaintiff of the rights guaranteed to him under the 14th Amendment of the Constitution of the United States of America, and constituting a violation of Section 51, Title 18 of the United States Code, which reads as follows:

> "Section 51. (Criminal Code, Section 19), Conspiracy to injure persons in exercise of civil rights. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000.00 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States. (R.S. ss 5508; Mar. 4, 1909, C. 321; ss 19, 35 Stat. 1092.)"[17]

X.

Plaintiff alleges that he has been damaged by the acts of the defendants and each of them in the amount of Fifty Thousand ($50,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the defendants and each of them in the amount of Fifty Thousand ($50,000.00) Dollars, and for such other relief as the Court may deem just and proper.

C. H. RICHESON
Attorney for Plaintiff,
27 E. Monroe Street
Phone 3-9878.

(Duly Verified.) [18]

American Academy of Medicine and Surgery

INCORPORATED UNDER AN ACT OF CONGRESS

TO ALL TO WHOM THESE PRESENTS SHALL COME

Greeting

Be it known that

W. S. Swank

Having completed in a satisfactory manner the course of instruction and passed the required examinations prescribed by this Academy, is entitled to this

DIPLOMA

and we hereby confer upon him the degree of

Doctor of Medicine

By virtue of authority vested in the American Academy of Medicine and Surgery by Congressional Act

In Witness Whereof we have affixed our signatures and the corporate seal of the American Academy of Medicine and Surgery at Washington, District of Columbia, this first day of June 1927

Erskine Yeigm. M.A., M.D. PRESIDENT

Chas. L. Pichel M.B., Litt. D. VICE PRESIDENT

Richard R. Schleusner M.A., M.D. DEAN

John Parsons Field M.A., M.D. SECRETARY

ENDORSED: FILED DEC 26 1942
EDWARD H. SCRUGGS, CLERK
United States District Court
for the District of Arizona
By Gwen. Roby, Deputy Clerk.

18

In the United States District Court
for the District of Arizona

October, 1942 Term At Phoenix

Minute Entry of
Monday, January 25, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

ORDER EXTENDING TIME TO ANSWER

On motion of Cecil A. Edwards, Esquire,

It Is Ordered that the time of all the defendants herein within which to answer be and it is extended until twenty days from this date. [21]

[Title of District Court and Cause.]

APPLICATION TO SET ORDER ASIDE EXTENDING TIME TO ANSWER, AND MOTION FOR DEFAULT

State of Arizona
County of Maricopa—ss.

Comes now, W. S. Swank, the plaintiff in the above entitled cause, and, first being duly sworn, deposes and says:

1. That a complaint and summons was filed in the above-entitled cause in this court on December 26, 1942; that a copy of the complaint herein, to-

gether with a copy of the summons issued thereon, was served in Phoenix, Arizona, on the defendants J. H. Patterson, Charles C. Bradbury on January 4, 1943; that said copies of complaint and summons were served on defendant Charles S. Smith on January 7, 1943 and that copies thereof were served on defendant E. J. Gotthelf on January 8, 1943, all in Maricopa County, Arizona.

2. That said cause of action is one for damages against the defendants in their individual capacities and not as State officials, and to that effect against each and all of them. [22]

3. That on January 25, 1943, Cecil A. Edwards, acting as a Deputy Attorney General of the State of Arizona, appeared before this Honorable Court and obtained therefrom a purported order extending the time for said defendants to answer, and that this Court, pursuant thereto, did enter an order extending the defendants' time for answer to twenty days from January 25, 1943.

4. That said Cecil A. Edwards, so acting as aforesaid, as Deputy Attorney General, did appear in this cause as above stated, in violation of Sec. 4-503 of the Arizona Code Annotated, 1939, which provides as follows:

> "The Attorney General shall be the legal adviser of all departments of the state and shall give such legal service as such departments may require. . . The Attorney General may, when the business of the state requires, employ assistants."

That because of said circumstances, the said At-

torney General, acting through his deputy, Cecil A. Edwards, had no right as such official to act in behalf of private individuals in a case brought by an individual; consequently, the purported appearance was unlawful and therefore null and void, which is further evident from the fact that subsequent to said purported appearance, the Hon. Walter J. Thalheimer, a member of the State Senate, has introduced therein a bill known as Senate Bill 61, for the manifest purpose of legalizing such acts as were performed herein by the said Cecil A. Edwards. That said bill provides, in addition to the present statute, that "whenever a state officer or any member of any board or commission of the State, has sued for damages for an act done by such officer or member in connection with the performance of the duties of his office, the Attorney General may represent such officer or member in any such action." [23]

That said bill has not become a law, consequently these provisions do not extend to the circumstances of this case.

[Signed] W. S. SWANK.

Before me personally appeared W. S. Swank, known to me to be the person whose name is subscribed to the foregoing instrument, and stated that he had read the foregoing affidavit and knows the contents of same, and that the same is true of his own knowledge.

[Seal] (Sgd) A. O. KANE
Notary Public.

My commission expires April 10, 1944.

Wherefore, plaintiff prays that the order extending the time for the defendants to answer as above stated, be revoked and stricken from the records, and that plaintiff have default against said served defendants, as prayed in his complaint.

[Signed] C. H. RICHESON
Attorney for Plaintiff.

NOTICE OF HEARING

To the above named defendants: You are hereby notified that plaintiff desires to argue the within motion to the Court on Monday, February 8, 1943 at ten o'clock a. m., pursuant to the rules of said court.

C. H. RICHESON
Attorney for plaintiff.

[Endorsed]: Filed Jan. 29, 1943. [24]

[Title of District Court and Cause.]

CORRECTED APPLICATION TO SET ORDER ASIDE EXTENDING TIME TO ANSWER, AND MOTION FOR DEFAULT

State of Arizona,
County of Maricopa—ss.

Comes now W. S. Swank, the plaintiff in the above-entitled cause, and, first being duly sworn, deposes and says:

I.

That a complaint and summons was filed in the above-entitled cause in this court on December 26,

1942; that a copy of the complaint herein, together with a copy of the summons issued thereon, was served in Phoenix, Arizona, on the defendants J. H. Patterson, Charles C. Bradbury on January 4, 1943; that said copies of complaint and summons were served on defendant Charles S. Smith on January 7, 1943, and that copies thereof were served on defendant E. J. Gotthelf on January 8, 1943, all in Arizona.

II.

That said cause of action is one for damages against the defendants in their individual capacities and not as State officials, and to that effect against each and all of them.

III.

That on January 25, 1943, Cecil A. Edwards, acting as a Deputy Attorney General of the State of Arizona, appeared before this honorable Court and obtained therefrom a purported order extending the time for said defendants to answer, and that this Court, pursuant thereto, did enter an order extending the defendants' time for answer to twenty days from January 25, 1943. [25]

IV.

That said Cecil A. Edwards, so acting as aforesaid, as Deputy Attorney General, did appear in this cause as above stated, in violation of Sec. 4-503 of the Arizona Code Annotated, 1939, which provides as follows:

> "The Attorney General shall be the legal adviser of all departments of the state, and shall

give such legal service as such departments may require . . . The Attorney General may, when the business of the state requires, employ assistants."

That because of said circumstances, the said Attorney General, acting through his said deputy, Cecil A. Edwards, had no right as such official to act in behalf of private individuals in a case brought against individuals; consequently, the purported appearance was unlawful and therefore null and void, which is further evident from the fact that subsequent to said purported appearance, the Hon. Walter J. Thalheimer, a member of the State Senate, has introduced therein a bill known as Senate Bill 61, for the manifest purpose of legalizing such acts as were performed herein by the said Cecil A. Edwards. That said bill provides, in addition to the present statute, that "whenever a state officer or any member of any board or commission of the State, has been sued for damages for an act done by such officer or member in connection with the performance of the duties of his office, the Attorney General may represent such officer or member in any such action."

That said bill has not become a law, consequently these provisions do not extend to the circumstances of this case.

W. S. SWANK

Before me personally appeared W. S. Swank, known to me to be the person whose name is subscribed to the foregoing instrument, and stated

that he had read the foregoing affidavit and knows the contents of same, and that the same is true of his own knowledge.

[Seal] HORTENSE ANDERSON
Notary Public.

My commission expires 8-24-1943. [26]

Wherefore, plaintiff prays that the order extending the time for the defendants to answer as above stated, be revoked and stricken from the records, and that plaintiff have default against said served defendants, as prayed in his complaint.

C. H. RICHESON
Atty for Plaintiff

NOTICE OF HEARING

To the above named defendants:

You are hereby notified that plaintiff desires to argue the within motion to the court on Monday, February 8, 1943 at ten o'clock a. m. pursuant to the rules of said court.

C. H. RICHESON
Attorney for Plaintiff

27 E. Monroe Street
Phoenix, Arizona
Phone 3-9878

[Endorsed]: Filed Feb. 2, 1943. [27]

In the United States District Court
For the District of Arizona
October 1942 Term At Phoenix
Minute Entry of
Monday, February 8, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

ORDER DENYING PLAINTIFF'S CORRECTED APPLICATION TO SET ORDER ASIDE EXTENDING TIME TO ANSWER

Plaintiff's Corrected Application to Set Order Aside Extending Time to Answer and Motion for Default come on regularly for hearing this day. C. H. Richeson, Esquire, appears as counsel for the plaintiff. Cecil A. Edwards, Esquire, appears as counsel for the defendants. Argument is now had by respective counsel, and

It Is Ordered that said Motion be and it is denied.

[28]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, J. H. Patterson, E. J. Gotthelf, Charles S. Smith and Charles C. Bradbury, by their attorneys, and move that the Court dismiss plaintiff's complaint on the grounds and for the reasons hereinafter stated.

I.

The Court has no jurisdiction over the subject matter of this action.

II.

That the complaint does not state a claim upon which relief can be granted.

T. E. SCARBOROUGH
C. A. EDWARDS
Assistant Attorney General
Attorneys for all defendants
other than William G. Schultz

POINTS AND AUTHORITIES IN SUPPORT OF FOREGOING MOTION

There is no allegation of facts which will show or tend to show a conspiracy within the purview of Title 18, Section 51, United States Code.

There is not sufficient allegation to show or tend to show that plaintiff was entitled to be given an examination for a license to practice medicine. Rule 12 (b).

[Endorsed]: Filed Feb. 8, 1943 [29]

[Title of District Court and Cause.]

APPLICATION FOR ORDER REMOVING CECIL A. EDWARDS, ASSISTANT ATTORNEY GENERAL, AS COUNSEL FOR DEFENDANTS

Comes now, W. S. Swank, plaintiff in the above entitled cause and moves the Court to strike the name of Cecil A. Edwards, Assistant Attorney General, as counsel for the defendants herein, because this is an action for damages against the defendants, and each of them, privately; because the State Law prohibits the Attorney General's office from practicing law privately; that this case is for damages as a result of the defendants denying plaintiff his constitutional rights, in which the defendants are alleged to have violated Section 2, Article 15, of the United States Code, and Section 74-101 of the Code of the State of Arizona; that the defendants have violated Section 51, Criminal Code, Section 19, of the United States Statutes, in denying the plaintiff his rights guaranteed under the Fourteenth Amendment of the Constitution of the United States;

That the Attorney General is not only prohibited from practicing law privately, and in appearing herein is appearing for the defendants accused of violating the law, therefore the State has no interest in the case and the Attorney General has no right to appear on behalf of these defendants amicus curiae.

Wherefore, Plaintiff moves that the name of Cecil A. Edwards, Assistant Attorney General, be stricken in this case.

Respectfully submitted,
C. H. RICHESON
Attorney for Plaintiff.

27 East Monroe Street
Phoenix, Arizona
Phone 3-9878 [30]

[Endorsed]: Filed Feb 10 1943 [31]

In the United States District Court for the District of Arizona

October 1942 Term — At Phoenix

Minute Entry of March 20, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding

[Title of Cause.]

ORDER GRANTING PLAINTIFF LEAVE TO FILE SECOND AMENDED COMPLAINT

On motion of C. H. Richeson, Esquire, counsel for the plaintiff,

It Is Ordered that the plaintiff be granted leave to file Second Amended Complaint herein. [32]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Comes now the plaintiff and by his second amended complaint against the above defendants, alleges:

That this is an action of a civil nature in law for damages over which the District Courts of the United States are given original jurisdiction.

The controversy; violation by the defendants of the Fourteenth Amendment to the United States Constitution; violation of Section 2, Article 15 of the Laws of the United States, known as the anti-trust law; all in violation of plaintiff's rights and benefits, and to his damages in excess of Three Thousand Dollars ($3,000.00).

I.

That the plaintiff is now, and for many years last past has been a citizen of the United States and a bona fide resident of Maricopa County, State of Arizona, within the district of Arizona; that during all of said years he has been engaged as a practitioner of the healing arts, and is the lawful holder of a diploma issued to him by The American Academy of Medicine and Surgery on June First, 1927, a true copy of which is hereto attached, marked Exhibit "A" and by reference made a part hereof.

That the said The American Academy of Medicine and Surgery was then located at the City of Washington, D. C., was a [33] legally chartered

school and college of medicine, and was incorporated by an Act of the Congress of the United States.

II.

That the Legislature of the State of Arizona, in 1917, enacted Article 9, Sections 2554, 2555, 2556 entitled "Medicine and Surgery", namely:

"Sec. 2554. Board of medical examiners; appointment; terms; meetings; salary. The governor shall appoint a board of medical examiners consisting of five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practitioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the State Capitol on the fist Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter

cognizable by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board".

"Sec. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication or statement, claim his ability or willingness to, or does diagnosticate, or prognosticate, any human ills; or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or perform any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opti*ti*ons, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy."

"Sec. 2556. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provi-

sions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a [34] regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulation, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, and including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five per cent additional for each subsequent ten years of such practice, but must receive not less than fifty per cent upon any one subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one year after such examination. In the examination, the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or for-

eign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of [35] the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license, who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee for reciprocity certificate shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars".

III.

That, thereafter, the legislature of the state of Arizona, in 1936, enacted what is commonly called and known as the "Basic Science Law", supplanting the aforesaid laws of 1917, and being Sections 67-1101, 67-1102, 67-1103 and 67-1104, namely:

"67-1101. Board of Medical Examiners - Appointment - Term - Meetings - Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of medical schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth (4) for five (5) years and the fifth for six (6) years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at

the state capitol on the first Tuesday of January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary, not to exceed twelve hundred ($1200.00) dollars per year, and the compensation of the other members not to exceed Ten ($10.00) dollars for each day of actual service, not exceeding fifty days in any one year, and the members of the board shall receive their actual expenses when on business of the board, not exceeding fifty ($50.00) dollars in any one year. [36]

"Sec. 67-1102. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does for hire diagnosticate, or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or perform any operations, or manipulation, or application, for compensation therefor, except it be in usual business of optitions, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy.

"Sec. 67-1103. Certificates to practice - Requirements of applicants - Examination - Reciprocity certificates - fees. Three (3) forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice

medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the County Recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination, without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate

to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstretics, general diagnosis, hy*g*ene. Examination in each subject shall consist of not less than ten (10) questions, answers to which shall be marked upon a scale of zero to ten. [37] An applicant must obtain not less than a general average of seventy-five (75) percent, and not less than sixty (60) percent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted full credit, —— (5) percent upon the general average, and five (5) percent additional for each subsequent ten (10) years of such practice, but must receive not less than fifty (50) percent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known by numbers only, and the name attached to the numbers shall be kept secret until after the board has finally passed upon the application. The secretary

of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificates shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificates or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of issuance of said last named certificates, was an ethical practitioner and has practiced medicine and surgery for at least three (3) years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars ($100.00); if the credentials are held insuf-

ficient, seventy-five dollars ($75.00) thereof shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars ($25.00).

Sec. 67-1104. Fee - Records. Each applicant, on making application, shall pay a fee of twenty-five ($25.00) dollars, fifteen dollars ($15.00) of which shall be returned if the applicant's credentials are insufficient, or he does not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination". [38]

IV.

That said laws of 1936, in substance, provide that anyone, to qualify for examination to practice medicine and surgery, "shall file with the board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year." In this regard, plaintiff avers that the Association of American Medical Colleges is not a legal or proper authority to prescribe the qualifications for the

medical professor or for the practioners of medicine and surgery, and, therefore, such requirements and prescibed qualifications ae unconstitutional and void as a delagation of legislative power; that the law-makers of Arizona alone may prescribe the qualifications for the practice of medicine and surgery within the State of Arizona.

That the requirements for and during the year 1927, by the afore-mentioned American Academy of Medicine and Surgery, were equal to or not less than those of the association of American Medical Colleges for and during that year, to the actual knowledge of the defendants and each of them individually.

V.

That the Association of American Medical Colleges is sponsored by the American Medical Association, of which the defendants are members, except the defendant, Charles C. Bradbury; that the defendants by reason of their said membership and its rules and prescriptions by its legislative committee did, and do, in fact prescribe the qualifications for applicants for license to practice medicine and surgery in the state of Arizona, contrary [39] to law, arbitrarily, unlawfully and discriminatory to qualified applicants, including the plaintiff.

That both the American Medical Association and the Association of American Medical Colleges are monopolistic and act in violation of Section 2, Title 15 of the Laws of the United States, and in violation of Section 74-101 of the laws of the State of

Arizona; both of which said provisions of law prohibit trusts and monopolies.

VI.

That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well knowing that plaintiff was and is in every respect qualified to have issued to him a license to practice medicine and surgery in Arizona, and for other personal reasons best known to each of them, and because of envy, bias and prejudice toward him, and in fear of his competition and qualifications in the methods and practice of the healing arts, have refused to accept his credentials and to issue him a license to practice medicine and surgery in Arizona, and have also refused to give him an examination; all with knowledge that their acts and conduct herein complained of are wrongful, unlawful and unconstitutional.

VII.

That by the acts of each of the defendants, as herein charged, the plaintiff has been denied the benefits and rights granted him under and by the

provision of the Fourteenth Amendment to the Constitution of the United States, namely: [40]

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

VIII.

That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards, rules and requirements, through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American Medical Association, but that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona,

in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge.

IX.

That by the wilful, unlawful, and malicious acts and conduct of the defendants, personally and individually, as herein charged, the plaintiff has been deprived of his license to practice medicine [41] and surgery in Arizona continuously since 1933, and of his right to practice the healing arts incident thereto, resulting in great pecuniary losses to him and causing him to suffer humiliation and discredit as a physician and surgeon, all to his actual damages in the sum of Fifty Thousand Dollars ($50,000.) and exemplary damages in the sum of Fifty Thousand Dollars ($50,000.00).

The Plaintiff Demands judgment against the defendants and against each of them in the sum of $100,000.00, and for costs of suit.

W. S. SWANK,
Plaintiff
By C. H. RICHESON,
His Attorney.

Received copy 3-20-43
C. A. EDWARDS
T. E. SCARBOROUGH
Attys for defts. [42]

EXHIBIT "A"

AMERICAN ACADEMY OF MEDICINE AND SURGERY

Incorporated Under An Act of Congress

TO ALL TO WHOM THESE PRESENTS SHALL COME

GREETING

Be it Known That

W. S. SWANK

Having completed in a satisfactory manner the course of instruction and passed the required examinations prescribed by this Academy, is entitled to this

DIPLOMA

And we hereby confer upon him the degree of
DOCTOR OF MEDICINE

By virtue of authority vested in the American Academy of Medicine and Surgery by Congressional Act.

IN WITNESS WHEREOF, we have affixed our signature and the corporate seal of the American

Academy of Medicine and Surgery at Washington, District of Columbia, this first day of June, 1927.

M. ERSKINE YUGIN, M.A., M.D.
President

CHAS. L. PICHEL, M.B., Litt.D.
Vice President.

RICHARD R. SCHLEUSNER, M.A., M.D.
Dean

JOHN PARSONS FIELD, M.A., M.D.
[Seal] Secretary [43]

[Endorsed]: Filed Mar. 20, 1943. [44]

In the United States District Court for the District of Arizona

April 1943 Term At Phoenix

Minute Entry of Monday, April 5, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

ORDER TAKING UNDER ADVISEMENT MOTION TO DISMISS

Motion of defendants J. H. Patterson, E. J. Gotthelf, Charles S. Smith, and Charles C. Bradbury to Dismiss and Plaintiff's Application for Order Removing Cecil A. Edwards, Assistant Attorney

General, as Counsel for defendants, come on regularly for hearing this day.

C. H. Richeson, Esquire, appears as counsel for the plaintiff. T. E. Scarborough, Esquire, appears as counsel for the defendants.

Argument is now had by respective counsel, and

It Is Ordered that said Motion to Dismiss and said Application for Order Removing Cecil A. Edwards, Assistant Attorney General, as Counsel for defendants be submitted and by the Court taken under advisement. [45]

In the United States District Court for the District of Arizona

April 1943 Term At Phoenix

Minute Entry of Tuesday, April 27, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

CIV-359

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, et al,

Defendants.

ORDER DISMISSING CASE

It Is Ordered that this case be dismissed for the reason that the complaint does not state a cause of action. [46]

[Title of District Court and Cause.]

NOTICE OF APPEALS TO THE NINTH CIRCUIT COURT OF APPEALS

To the Honorable David W. Ling,

Judge of the Above Entitled Court:

Notice is hereby given that W. S. Swank plaintiff above named, hereby appeal to the Circuit Court of Appeals for the ninth circuit from the order dismissing for the reason that the complaint did not state a cause of action; entered in this action on April 27, 1943.

C. H. RICHESON
Attorney for Appellant
W. S. Swank

Copy Received April 30, 1943.
T. E. SCARBOROUGH
CECIL EDWARDS
Atty's for defts.

[Endorsed]: Filed Apr. 30, 1943. [47]

In the United States Circuit Court of Appeals for the Ninth Circuit

No. Civ. 359 Phx.

W. S. SWANK,

Plaintiff-appellee,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY and WILLIAM G. SCHULTZ,

Defendants.

PLAINTIFF-APPELLANT'S STATEMENT OF POINTS

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby notified that the plaintiff-appellant intends to rely in this appeal on the following points:

The District Court erred in—

I.

Overruling plaintiff's application to set order aside extending time to answer and Motion for Default on the original complaint filed herein.

II.

That the Court erred in refusing to remove Cecil A. Edwards as Assistant Attorney General as counsel for the defendants in this cause.

III.

In entering an Order dismissing the second Amended Complaint, because said Complaint did not state a cause of action.

C. H. RICHESON
Attorney for Plaintiff-
appellant.

5/10/43 Rec'd copy.

T. E. SCARBOROUGH
C. A. EDWARDS
Atty. for Defs.
By M. L. B.

[Endorsed]: Filed May 10, 1943. [48]

In the District Court of the United States in and for the Federal District of Arizona

No. Civ. 359—Phoenix.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G. SCHULTZ,

Defendants.

BOND ON APPEAL

Know All Men By These Presents, That I, W. S. Swank, as principal, acknowledge myself firmly

bound unto J. H. Patterson, E. J. Gotthelf, Charles S. Smith, Charles C. Bradbury, and William G. Schultz, defendants, in this sum of Two Hundred Fifty ($250) Dollars, which has been paid in to this Court in cash, conditioned that I shall pay or cause to be paid to said defendants all sums of money, costs, and damage whatsoever as costs in this action pending on appeal to the Ninth Circuit Court of Appeals of the United States, conditioned that said appeal shall be prosecuted to effect, resulting in an adverse decision to me as plaintiff.

Dated, Phoenix, Arizona, this the 3rd day of May, A. D. 1943.

W. S. SWANK

State of Arizona,
County of Maricopa—ss.

This instrument was acknowledged before me by W. S. Swank this the 3rd day of May, A. D. 1943.

My commission expires 8-24-43.

[Seal] HORTENSE ANDERSON
Notary Public

[Endorsed]: Filed May 3, 1943. [49]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. Civ.-359 Phx.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G. SCHULTZ,

Defendants.

PLAINTIFF-APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States Circuit Court of Appeals for the Ninth District.

You are hereby requested to include in the record on appeal herein—

(1) The original complaint filed herein.

(2) Application to set order aside extending time to answer, and Motion for Default.

(3) Application for Order removing Cecil A. Edwards, Assistant Attorney General of the State of Arizona as counsel for the defendants.

(4) Second amended complaint filed herein.

(5) Order of the Court extending time to answer.

(6) Order of the Court refusing Application to set Order aside eetending time to answer a Motion for Default.

(7) Defendants Motion to Dismiss.

(8) Order dismissing second amended complaint

because said complaint did not state a cause of action.

(9) Plaintiff Appellants statement of points.

(10) This designation of the contents of the record on appeal.

(11) Plaintiff's Bond on Appeal. [50]

This transcript is to be prepared as required by law and the rules of this Court and the rules of the Circuit Court of Appeals for the Ninth Circuit, and is to be filed in the office of the said Court of Appeals at San Francisco, California.

Dated this 10th day of May, 1943.

C. H. RICHESON
Attorney for plaintiff-appellant.

5/10/43 Rec'd copy
T. E. SCARBOROUGH
C. A. EDWARDS
By M. D. B.

[Endorsed]: Filed May 10, 1943. [51]

In the United States District Court for the District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona,

do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of W. S. Swank, Plaintiff, versus J. H. Patterson, E. J. Gotthelf, Charles S. Smith, Charles C. Bradbury, and William C. Schultz, Defendants, numbered Civ-359 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 51, inclusive, contain a full, true and correct transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Plaintiff-Appellant's Designation of Contents of Record on Appeal filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of $12.00, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 24th day of May, 1943.

[Seal] EDWARD W. SCRUGGS,
Clerk
By WM. H. LOVELESS
Chief Deputy Clerk. [52]

[Endorsed]: No. 10,443. United States Circuit Court of Appeals for the Ninth Circuit. W. S. Swank, Appellant, vs. J. H. Patterson, E. J. Gotthelf, Charles S. Smith, Charles C. Bradbury and William G. Schultz, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 27, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10443

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G. SCHULTZ,

Defendants.

PLAINTIFF-APPELLANT'S STATEMENT OF POINTS

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby notified that plaintiff-appellant adopts and here incorporates by reference as a statement of points on which it is intended to rely on appeal. The plaintiff-appellant's statement of

points appear in the Transcript of Record heretofore transmitted to this Court.

C. H. RICHESON
Attorney for plaintiff-appellant.

5/10/42 Rec'd Copy.

T. E. SCARBOROUGH
C. A. EDWARDS
By M. D. BROWN
Atty. for Defs.

[Endorsed]: Filed May 27, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PLAINTIFF-APPELLANT'S DESIGNATION OF PRINTED RECORD

To the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby notified that the plaintiff-appellant designates for printing the entire Transcript of the record heretofore transmitted to this Court.

C. H. RICHESON
Attorney for plaintiff-appellant.

5/10/43. Rec'd copy.

T. E. SCARBOROUGH
C. A. EDWARDS
Attys. for Defs.
By M. D. BROWN

[Endorsed]: Filed May 27, 1943. Paul P. O'Brien, Clerk.

No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

v.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G SCHULTZ,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF FOR THE APPELLANT

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.

No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

v.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G SCHULTZ,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

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BRIEF FOR THE APPELLANT

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.

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INDEX—Continued

No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

v.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, and WILLIAM G SCHULTZ,

Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

BRIEF FOR THE APPELLANT

OPINION BELOW

The memorandum of order denying appellant's corrected application to set order aside extending time to answer and motion for default page 26 of the Record, and the order dismissing case for the reason that the complaint does not state a cause of action is on page 48 of the Record. Also, order denying application to remove Cecil A. Edwards as counsel for appellees page 28 of the Record.

JURISDICTION

The amended complaint filed March 20, 1943, as well as the original complaint filed December 26, 1942, is for the recovery of damages to appellant because appellees conspired to perfect and put in operation a monopoly in violation of Section 2, Title 15, of the Laws of the United States, to deny appellant his constitutional rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Whether the default should be had on appellant's corrected application to set order aside extending time to answer and motion for default.

Whether the American Medical Association and its subsidiaries can set the standard of qualifications for the practice of medicine.

Whether Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, can represent appellees in this action.

STATUTES AND REGULATIONS INVOLVED

All of Article 9, Laws of Arizona, 1928:

Article 9. Medicine and Surgery.

S. 2554. Board of Medical Examiners; appointment; terms; meetings; salary. The governor shall appoint a Board of Medical Examiners consisting of

five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice president, second vice president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the state capitol on the first Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (S S 1-2-3-4-5. 13 Ch. 17, L'13 and S.S.; 4733- 4-5-6-7, 4745, R.S. '13; 4734, Am. 73, Ch. 35, L. '22 cons. & rev.) S. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness, to or does diagnosti-

cate, or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or performs any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians, or of vendors of dental or surgical instrument, apparatus or appliances. Practicing medicine shall include this practice of osteopathy. (S. 6, id.: 4738, R.S. '13 rev.) S. 2566. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board,

stating that he is the lawful holder thereof and that the same was procured without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma, from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynocology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five per cent upon

the general average, and five per cent additional for each subsequent ten years of such practice, but must receive not less than fifty per cent upon any one subject. The examination papers shall form part of the records of the board and shall be kept on file by the secretary for one year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The Secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application, and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or foreign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a

reciprocity certificate or license, who shall otherwise comply with the provision hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee for reciprocity certificates shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall betwenty-five dollars. (S. 7, id.; 4739, R.S. '13 am., Ch. 66 L '17, Ch. 119, L' '21 rev.)

* * *

Sections 67-1101 to 671114, Revised Code of Arizona, 1939:

67-1101 Board of Medical Examiners—Appointment—Terms—Meetings—Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of

schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said profession respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth for five (5) years and the fifth for six (6 years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner, with, or financially interested in, any college or school of medicine surgery or osteopathy shall be appointed.

The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at the state capitol on the first Tuesday of January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board, The board shall fix the salary of the secretary, not to exceed twelve hundred ($1200.00 dollars per year, and the compensation of the other members not to exceed ten dollars ($10.00) for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (R.S. 1913, S S 4733-4737, 4745; Laws 1922, Ch. 35, S S 73, p. 174, cons. & rev. RC 1928, SS 2554; Laws 1935, Ch. 99, ss 1. p. 409.)

67-1102 Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does diagnosticate or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or performs any operation, or manipulation, or appplication for compensation therefor, except it be in usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy. R.S. 1913, ss 4783; Rev. R. C. 1928, ss 2555.)

67-1103. Certificate to practice—Requirements of applicants—Examination—Reciprocity certificates—Fees. Three (3) forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such

diploma, not less than those prescribed by the Association of American Medical College for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject, shall consist of not less than ten (10 questions,

answers to which shall be marked upon a scale of zero to ten. Applicant must obtain not less than a general average of seventy-five (75) per cent, and not less than sixty (60) per cent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted a credit of five (5) per cent upon the general average, and five (5) per cent additional for each subsequent ten (10 years of such practice, but must receive not less than fifty (50) per cent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known and designated by number only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona, at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license

first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last namer certificate was an ehtical practioner and has practiced medicine and surgery for at least three (3) years immediate prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish charecter testimonial or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars ($100.00), if the credentials are held insufficient seventy-five dollars ($75.00) shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars ($25.00). (R.S. 1913 ss 4739; Laws 1917, Ch. 66 ss 1, p. 98; L 1921, Ch. 119, ss 1 p. 264. Rev. R.C. 1928 ss 2556.)

67-1104. Fee—Records. Each applicant, on making application shall pay a fee of twen-five ($25.00) dollars, fifteen ($15.00) of which shall be returned if the applicant's credentials are insufficient, or he does

not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination. (R.S. 1913, ss 4740, 4741; Cons. & Rev. R.C. 1928 ss 2557.)

* * *

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Article III of the Constitution of the United States, in part:

ARTICLE III. Section 1. The judicial power of the United States, shall be vested in one Supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish.

Section 2, Title 15, Laws of the United States:

S. 2. Monopolizing trade a misdemeanor; penalty.

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, S 2, 26 Stat. 209.

* * *

Subdivision 1, Section 4-502, Laws of Arizona 1939:

S. 4-502. Duties.—The attorney-general shall:

1. Devote his entire time to the discharge of the duties of his office and not engage directly or indirectly in the private practice of law;

* * *

Rule 9, Rules of Practice of the United States District Court for the District of Arizona:

RULE 9—LAW AND MOTION CALENDAR; STATEMENT OF POINTS AND AUTHORITIES.

With every pleading or motion raising questions of

law to be determined by the court, there shall be served and filed by the party urging the same, a brief or memorandum of the points and authorities in support of the issues raised in such pleading or motion, and failure to file such memorandum shall be deemed a waiver of such pleading or motion. The opposing party or parties shall have 5 days after such service within which to serve and file a vrief or memorandum of points and authorities in opposition to such pleading or motion. Pleadings and motions raising questions of law to be determined by the court, other than at the traial, will be submitted without oral argument on the memoranda of points and authorities required to be filed by this rule, provided, however, any party desiring to be heard on any such pleading or motion may serve and file with his pleading or motion or with his memorandum of points and authorities, a notice of hearing, and the pleading or motion shall thereupon be placed on the law and motion calendar for hearing on the first law and motion day occurring after the expiration of 5 days after the time to file briefs or memorandum of points and authorities with respect to said pleading or motion has expired. A failure to file a brief or memorandum of points and authorities in oppostion to any pleading or motion raising questions of law shall constitute a consent of the party failing to file such brief or memorandum to the sustaining of said pleading or granting of said motion. Should the court desire oral argument on any pleading or motion submitted, the clerk will place the same on the law and motion calendar and notify respective parties or counsel accordingly.

Unless otherwise ordered by the court, or provided in these rules, every Monday shall be law and motion day, on which will be heard ex parte motions and all pleadings or motions raising questions of law or fact to be determined by the court before trial or after verdict. Parties filing motions on which hearings are to be had shall notice the same for hearing on a law and motion day and all motions noticed for hearing on any other day are hereby continued to the first law and motion day following the day fixed in the notice of hearing unless otherwise ordered by the court. Such motions or pleadings in cases filed in the Tucson or Globe Divisions of the court will be heard at Tucson; such motions or pleadings in cases filed in the Phoenix or Prescott Division of the court will be heard at Phoenix, provided, when court is in session at Globe or Prescott on law and motion day, such motions or pleadings in cases filed in the Globe or Prescott Divisions will be heard at Globe in cases filed in the Globe Division and will be heard at Prescott in cases filed in the Prescott Division; and provided further, when the convenience of the court or counsel may require, the Court may hear and determine any such motion or pleading at any of the four places designated for holding the terms of this court.

* * *

Rule 6 of the Rules of United States District Courts:

Rule 6. Time.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law.

(c) Unaffectedby Expiration of Term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by

the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(d) For Motions—Affidavtits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supportedby affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

STATEMENT

The court below made only the following findings:

That the motion for default should not b granted, and denied the application to remove Cecil A. Edwards, Assistant Attorney General, representing the appellees, and dismissed the action for the reason that

the second amended complaint did not state a cause of action (R. 23 and 48).

This is an action by appellant for damages against appellees for denyying him the right to be examined for a license to practice medicine and in so doing conspiring to violate Section 2, Title 15, of the Laws of the United States, thereby denying the rights guaranteed to appellant under Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Appellees are members of the American Medical Association. Morris Fishbein, the Secretary of the American Medical Association, before a subcommittee of the Committee on Education and Labor of the United States Senate, Seventy-seventh Congress, on Senate Resolution 291, testified as follows:

> Senator PEPPER. Where do you live, Doctor?
> Dr. FISHBEIN. Chicago.
>
> Senator PEPPER. Where did you receive your medical education?
>
> Dr. FISHBEIN. The University of Chicago and the Rush Medical Clolege, Chicago.
>
> Senator PEPPER. How long have you been engaged in the practice of medicine?
>
> Dr. FISHBEIN. Following my graduation I was about a year and a half in practice and in pathologic research.

Senator PEPPER. And where was that carried on, largely?

Dr. FISHBEIN. In Chicago.

Senator PEPPER. You have been in active practice only about 1½ years since your graduation?

Dr. FISHBEIN. Yes, sir.

Senator PEPPER. That covers what period, Doctor?

Dr. FISHBEIN. From 1912 to toward the end of 1913.

Senator PEPPER. You are not now engaged in the practice of medicine?

Dr. FISHBEIN. No, sir.

Senator PEPPER. What is your employment at the present time?

Dr. FISHBEIN. I am editor of the Journal of the American Medica Association, and of Hygeia, a health magazine. I also am professorial lecturer of medicine at the University of Chicago School of Medicine, and the University of Illinois.

Senator PEPPER. What are the subjects of your lectures?

Dr. FISHBEIN. Medical economics and history of medicine.

Senator PEPPER. They are not technical subjects?

Dr. FISHBEIN. Not practical medicine.

Senator PEPPER. How long have you held your present postion?

Dr. FISHBEIN. I have been editor since 1924, and assistant editor from the end of 1913 up to 1924.

Senator PEPPER. In what manner were you chosen for your present position?

Dr. FISHBEIN. I was chosen by the board of trustees of the American Medical Association, which is the body elected by the house of delegates to administer its affairs.

Senator PEPPER. Will you give us a brief summary as to the nature of the organization known as the American Medical Association, the number who are in it, and what its organizational setup is, Doctor?

Dr. FISHBEIN. The American Medical Asbership organization. There are in theetaoinisociation is a voluntary organization, voluntary membership organization. There are in the

United States about 176,000 doctors licensed to practiced. There are 123,000, approximately, who are members of the American Medical Association.

These members are organized into county medical societies, which in turn are organized into State medical societies. The county medical societies elect delegates to the State medical associations and the house of delegates of each of the State associations elects delegates to the house of delegates of the American Medical Association. The house of delegates of the American Medical Association is the body charged with establishing

all policies of the American Medical Association.

Senator PEPPER. Do you have annual conventions?

Dr. FISHBEIN. There is an annual convention of the house of delegates and of the organization, and in addition to that, special meetings when called for.

Senator PEPPER. That annual convention embraces which house of delegates, the national house?

Dr. FISHBEIN. The national house of delegates.

Senator PEPPER. The one that is elected by the States?

Dr. FISHBEIN. By the State house of delegates.

Senator PEPPER. And the national house of delegates selects a board of trustees?

Dr. FISHBEIN. The national house of delegates selects a board of trustees.

Senator PEPPER. How many are there on that board?

Dr. FISHBEIN. There are nine members of the board of trustees. Two are elected each year to serve a term of 5 years, and the maximum term is 10 years for any trustee.

Senator PEPPER. You are employed, then, by the board of trustees?

Dr. FISHBEIN. I am employed by the board of trustees.

Senator PEPPER. Do you have a national headquarters of the association?

Dr. FISHBEIN. The national headquarters is in Chicago.

Senator PEPPER. How much of a clerical and managerial staff is employed?

Dr. FISHBEIN. We employ from 630 to 640 people.

Senator PEPPER. Are you considered the executive director of the organizational set-up of the association?

Dr. FISHBEIN. No, sir; the association is organized with a secretary and general manager, who is the executive director. That is Dr. West. I am the editor in charge of publications.

Senator PEPPER. Who determines the public policy for the assocation?

Dr. FISHBEIN. The house of delegates determines all policies, and the officials of the association are charged with maintaining and extending to the professional the policies of the association.

Senator PEPPER. Do you sit in with the group which determines the policies of the association?

Dr. FISHBEIN. I have no voice in the house of delegates except when called to give information.

Senator PEPPER. As a practical matter, do you consult with the members of this body in the formation of policies?

Dr. FISHBEIN. I may appear before any committee. All actions of the house of delegates are taken by setting up a reference commitee

which hears the proposed action, and any member of the association may appear before any reference commitee. The reference committee brings back its report to the house and then the house acts on the report of the reference committee, after debate.

Senator PEPPER. As a practical day-by-day matter, the articulation of the policy occurs primarily in the publication known as the Journal of the American Medical Association?

Dr. FISHBEIN. Yes.

Senator PEPPER. Of which you are editor?

Dr. FISHBEIN. Yes, sir.

Senator PEPPER. So that you are the one who articulates these policies that are formed, you say, by these authorities?

Dr. FISHBEIN. Of course, the proceedings of the House of Delegates are published, broadcast, to the medical professiona and the Nation as soon as an action is taken; the articulation of the policy is in the proceedings of the house of delegates which are published as a routine matter without modification.

Senator PEPPER. How many times are those publications issued; how many times is the action of the house of delegates published?

Dr. FISHBEIN. It is published at once when the action is taken, and then maybe it is published repeatedly if discussion is neede.

Senator PEPPER. How many times per year is the Journal of the American Medical Association published?

Dr. FISHBEIN. Every week.

Senator PEPPER. So the public gets a chance to see and hear the articulation of the Journal of the American Medical Association a great deal than they hear what is uttered by the body which you refer to, does it not?

Dr. FISHBEIN. That depends, of course, on the importance of the policy in relationship to the public situation.

At the last annual convention of the association in Atlantic City there were in attendance representatives of every press association and important newspaper in the country, so that the actions were widespread through the Nation.

Senator PEPPER. But the only weekly publication, the only regular periodical of the American Medical Association, is the Journal of which you are the editor?

Dr. FISHBEIN. No; there is also another publication which is sent to all newspapers and press

agencies throughout the country each week.

Senator PEPPER. What is that?

Dr. FISHBEIN. That is known as the American Medical Association News. So that all matters having to do with activities are sent uot each week.

Senator PEPPER. Who is the editor of that?

Dr. FISHBEIN. A layman named Lawrence Salter.

Senator PEPPER. Is his office in the headquarters of the association in Chicago?

Dr. FISHBEIN. Yes.

Senator PEPPER. Is there any practical cooperation between you and him?

Dr. FISHBEIN. He prepares the publication, and naturally it is O. K.'d by the editor and the general manager.

Senator PEPPER. Which means you?

Dr. FISHBEIN. And Dr. West.

Senator PEPPER. So, as a matter of fact you are considered are you not, Doctor, the able and eloquent voice of the American Medical Association?

Dr. FISHBEIN. Well, that is not my term.

Senator PEPPER. Maybe I should have said the pen instead of the voice?

Dr. FISHBEIN. I prefer to be known as the tditor of the Journal of the American Medical Association.

Senator PEPPER. Ofttimes we cannot limt ourselves below the reputation that we have gained, Doctor. As a matter of fact, do you make any public addresses?

Dr. FISHBEIN. Many.

Senator PEPPER. Roughly, how many speeches do you make in the course of a year, would you say?

Dr. FISHBEIN. About 100.

Senator PEPPER. Does any other official of the American Medical Association make as many addresses?

Dr. FISHBEIN. I would say that many of them make addresses. Dr. Boyer, who is head of our bureau of health education, makes perhaps 60 addresses a year.

Senator PEPPER. He speaks primarily about public health matters, more or less on technical subjects I would assume?

Dr. FISHBEIN. He speaks on public health. Now each of our trustees makes addresses. I would say that on an average each trustee may speak from 10 to 12 times a year.

Senator PEPPER. On matters of American Medical Association policy?

Dr. FISHBEIN. Almost wholly on policy.

Senator PEPPER. But it would not do any disservice to the great contribution that you have made to the medical association would it, Doctor, to say that so far as the American public is concerned, and generally so far as the American Medical Association members are concerned, you are the man, the official, the agency, through which the policies of the American Medical Association are regularly expressed in writing and in speech?

Dr. FISHBEIN. That is correct; yes, sir.

Senator PEPPER: Now, Doctor, would you be good enough to tel lus whether you are acquainted with the Assignment and Procurement Service, or rather the Procurement and Assignment Service which is set up under the War Manpower Commission?

Dr. FISHBEIN. I am acquainted with that service.

Senator PEPPER. Who is the head of that?

Dr. FISHBEIN. Dr. Frank Lahey.

Senator PEPPER. He was at one time president of the American Medical Association, was he not?

Dr. FISHBEIN. Yes, at the time he was appointed head of the Procurement and Assignment Board.

Senator Pepper. He has some assistants?

Dr. FISHBEIN. He has a board, including four other men.

Senator PEPPER. Are they members of the American Medical Association?

Dr. FISHBEIN. There are 123,000 members of the American Medical Association and it may almost be taken for granted that any physician of any repute at all is a member, so that these men are all members except Dr. Camalier who is on that board and is a member of the American Dental Association—C. Willard Camalier.

* * *

The American Medical Association Journal in every issue has a report on medical legislation, showing the activities in legislation for their group. In the early history of medicine in the United States there were three schools: the Allopathic, Homeopathic, and

Eclectic. The American Medical Association, controlled by the allopathic school of medicine, has been able to do away with the homeopathic schools, and there are few eclectic schools left. The American Medical Association have fostered legislation whereby they have been able to successfully legislate for the qualifications to such an extent that for one to be entitled to take an examination he should be a graduate of a school of medicine equal to the standards of the American Association of Medical Colleges, which is fostered by the American Medical Association. Because the American Academy of Medicine and Surgery, of which Dr. Swank, the appellee, is a graduate, is not recognized by the American Association of Medical Colleges, the appellees refused to give him an examination. The American Academy of Medicine and Surgery teaches the destruction certain drugs, such as narcotics.

The appellant, who has been practicing the healing arts as a naturopathic physician, has been able to cure dementia praecox, high blood pressure, and other diseases that he has made a special study of; and these diseases the American Medical Association admit they have no cure for, but because the cure does not come from their school they would rather the public suffer, and refuse to give him an examination as to his knowledge. This in spite of the fact that appellant has offered to give to the medical world the remedy of the diseases mentioned if they would even give him an examination and a license. But because his school does not belong to the trust that the appellees belong

to, they have even refused to give him an examination, and it is this violation of the anti-trust laws that appellant claims has caused his damages.

ARGUMENT

The corrected application to set aside order extending the time to answer, and motion for default, was filed February 2nd, 1943, supported by a brief of authorities as follows:

> The order extending the time to answer is unlawful because, in addition to the facts and law stated in the motion filed herein, Section 4-502 of the Code of Arizona provides as follows:
>
> The duties of the Attorney General shall be to devote his entire time to the discharge of the duties of his office and not directly or indirectly engage in the private practice of law.

The appellees made no legal appearance in this case, which was evidenced by their introduction in the Sixteenth Legislature of the State of Arizona of Senate Bill 61, which would have authorized the Attorney General to appear for the appellees in this case. Senate Bill 61 as introduced was as follows:

State of Arizona
Senate
Sixteenth Legislature
Regular Session

S. B. 61

Introduced by Mr. Walter J. Thalheimer

AN ACT

RELATING TO THE DUTIES OF THE ATTORNEY GENERAL AND AMENDING SECTION 4-503, ARIRZONA CODE OF 1939.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. Section 4-503 of the Arizona Code of 1939 is amended to read:

"4-503. LEGAL ADVISSOR OF DEPARTMENTS. The attorney-general shall be the legal advisor of all department of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, THE UNEMPLOYMENT COMPENSATION COMMISSION OF ARIZONA AND THE COLORADO COMMISSION OF ARIZONA no official, board, commission, or other agency of the state, other than the attorney-general, shall employ any attorney or make

any expenditure or insure any indebtedness for legal services. The attorney-general may, when the business of the state requires, employ assistants. PROVIDED THAT WHENEVER A STATE OFFICER OR ANY MEMBER OF ANY BOARD OR COMMISSION OF THE STATE IS SUED FOR DAMAGES FOR AN ACT DONE BY SUCH OFFICER OR MEMBER IN CONNECTION WITH THE PERFORMANCE OF THE DUTIES OF HIS OFFICE, THE ATTORNEY-GENERAL MAY REPRESENT SUCH OFFICER OR MEMBER IN ANY SUCH ACTION."

Sec. 2. EMERGENCY. To preserve the public peace, health and safety it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure and shall take effect upon its passage in the manner provided by law.

The bill did not pass the Arizona Senate.

* * *

Appellant had a right to have the case tried with-

out any unlawful delay and to have speedy relief as prayed for.

As there had been no legal appearance by the appellees, the application to extend the time for answering was unlawful. The right of the Attorney General or his deputies to practice law privately was decided by the State Supreme Court of Arizona definitely in the case of Conway v. State Consolidated Publishing Company, 112 P. 2d 218. The following additional authorities were cited in the brief furnished the court below in support of this application and motion for default:

> Rule 6 of this Court, Section B, provides as follows:
>
> "When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion (1) with or without motion or notice, order the period enlarged if application therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect; but it may not enlarge the period for taking any action under Rule 59, except as stated in subdivision (c) thereof, or the period for taking an appeal as provided by law."

The Department of Justice Bulletin on Federal Rules Decision in Blackmer v. Sun Oil Co., U. S. District Court in New Jersey, December 22, 1939, states:

"The time to file answer may be enlarged after expiration of the period originally prescribed only on motion and notice and not by an ex parte order. An order allowing defendant until a specified ate to 'respond' to the complaint does not authorize filing of motions directed to the pleadings.—"

Department of Justice Headnote.
Federal Rules Service, edited by Pike and Fischer, Vol. II, P. 29.

In the case of Kingsbury v. Brown et al., 92 P. 2d 1053, the Court said:

"To vacate a default, it is incumbent on defendant to show that his mistake was one of fact and not of law, and the neglect of a lawyer to familiarize himself with the law governing the practice of the forum within which his case is pending is not excusable."

In this case its is not a mistake on the part of these defendants, but a wilful violation of law. Therefore, the case of Weinberger v. Manning, 123 P. 2d 531 is applicable in this case wherein the court said:

"Courts are generous in relieving litigants of their defaults resulting from inadvertence or excusable neglect, but are not required to act as guardians for persons who are grossly careless as to their own affairs."

In appellant's second amended original complaint, Paragraph VIII thereof, it is alleged as follows:

"Plaintiff further alleges that the Association of American Medical Colleges is fostered by the American Medical Association; that both the American Medical Association and the American Association of Medical Colleges are monopolistic and act accordingly, in violation of Sec. 2, Title 15 of the United States Code Annotated and in violation of Sec. 74-101 of the Laws of the State of Arizona; that both of said sections prohobit monopolies and said provisions providing that the Association of American Medical College shall make and require such qualifications for the practice of medicine are contrary to the Constitution and Laws of the United States and the Constitution and Laws of the State of Arizona."

While the Supreme Court of the State of Arizona has not passed on the constitutionality of the present Basic Science Law, in Buehman et al. v. Bechtel, 114 Pac. 2d 227, they have stated as follows:

"(1) Only the legislature can create the stand-

ard and provide the reasonable limits of the power of admitting and excluding persons from a business, trade or profession. State v. Harris, supra. It may be granted that the legislature has fixed the standard as competency, ability and integrity and that such standard is a sufficient and a proper one for a person desiring to practice photography, yet it is apparent the legislature used language the board might construe as giving it the right to disregard such standard and set up an arbitrary standard of its own. The board might regard too much or too strong competition as 'sufficient reason' for not licensing a person, or the applicant's age, sex, color or religion might disqualify him. We cannot say the standard fixed by the legislature is not a sufficient guide to the board of examiners, or that the board would arbitrarily disregard such standard and refuse a license to one who qualified under the act, but we do call attention to the fact that the board may use its powers to make it very difficult for worthy persons to secure a license to practice photography.

"In connection with the free use of the police power over certain trades and occupations, for the purpose of securing to those engaged therein rights and powers of an exclusive and monopolisic character, we again quote from Harris v. State:

" 'Statutes regulating trades and occupations

by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations occupations ranging from the learned professions to the ordinary trades. U. N. C. Law Review, Vol. 17, p. 1.

" 'No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of the government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

" 'The stage of internal protest has been reached. In marginal cases controveries in the courts have arisen as to whether the organization has captured a sufficient quantum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative po-

sitions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A.L.R. 1366. Without the aid of the statute these groups would be mere trade guilds, or voluntary business association; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

" 'It is this power of exclusion of fellow workers in the same field that gives to the subject its social significance, and invites our most serious consideration of the constitutional guaranties of personal liberty and individual right called to our attention'."

Therefore, the appellees in committing the acts complained of were not acting as constituted officials of the State, which appellant contends prohibits the Attorney General from representing the appellees in this action.

The appellees' attroney, Cecil A. Edwards, as Assistant Attorney General, did not file any authorities opposing the application and motion for default,

but the date same came on to be heard and argued before the trial court, February 8, 1943, Cecil A. Edwards, as Assistant Attorney General, just before argument, in the courtroom handed counsel for appellant the motion to dismiss filed heretin (R. 27), and added thereto the name of T. E. Scarborough as counsel for appellees.

Appellant respectfully submits that in view of Rule 9 of the Rules of Practice of the United States District Court of Arizona, which reads as follows:

> RULE 9—LAW AND MOTION CALENDAR; STATEMENT OF POINTS AND AUTHORITIES.
>
> With every pleading or motion raising questions of law to be determined by the court, there shall be served and filed by the party urging the same, a brief or memorandum of the points and authorities in support of the issues raised in such pleading or motion, and failure to file such memorandum shall be deemed a waiver of such pleading or motion. The opposing party or parties shall have 5 days after such service within which to serve and file a brief or memorandum of points and authorities in oppostion to such pleading or motion. Pleadings and motions raising questions of law to be determined by the court, other than at the trail, will be submitted without oral argument on the memoranda of points and authorities required to be filed by this rule, provided, how-

ever, any party desiring to be heard on any such pleading or motion may serve and file with his pleading or motion or with his memorandum of points and authorities, a notice of hearing, and the pleading or motion shall thereupon be placed on the law and motion calendar for hearing on the first law and motion day occurring after the expiration of 5 days after the time to file briefs or memorandum of points and authorities with respect to said pleading or motion has expired. A failure to file a brief or memorandum of points and authorities in opposition to any pleading or motion raising questions of law shall constitute a consent of the party failing to file such brief or memorandum to the sustaining of said pleading or granting of said motion. Should the court desire oral argument on any pleading or motion submitted, the clerk will place the same on the law and motion calendar and notify respective parties or counsel accordingly.

Unless otherwise ordered by the court, or provided in these rules, every Monday shall be law and motion day, on which will be heard ex parte motions and all pleadings or motions raising questions of law or fact to be determined by the court before trial or after verdict. Parties filing motions on which hearings are to be had shall notice the same for hearing on a law and motion

> day and all motions noticed for hearing on any other day are hereby continued to the first law and motion day following the day fixed in the notice of hearing unless otherwise ordered by the court. Such motions or pleadings in cases filed in the Tucson or Globe Divisions of the court will be heard at Tucson; such motions or pleadings in cases filed in the Phoenix or Prescott Divisions of the court will be heard at Phoenix, provided, when court is in session at Globe or Prescott on law and motion day, such motions or pleadings in cases filed in the Globe or Prescott Divisions will be heard at Globe in cases filed in the Globe Division and will be heard at Prescott in cases filed in the Prescott Division; and provided further, when the convenience of the court or counsel may require, the Court may hear and determine any such motion or pleading at any of the four places designated for holding the terms of this court,

with the above authorities cited, the court below erred in denying the application to set aside order extending time to answer, and motion for default.

This same line of authorities was filed in a brief supporting the application for an order removing Cecil A. Edwards, Assistant Attorney General of the State of Arizona, as counsel for appellees, and the same facts apply that no brief was filed opposing same. And again we respectively submit in view of the authorities cited and Rule 9 of the Rules of Practice of the

United States District Court for the District of Arizona, supra, the court below erred in denying said application, and appellant respectfully submits that this Court should give appellant a judgment as prayed for in the original complaint, on the pleadings.

II

The second amended complaint was dismissed on the motion to dismiss by appellees, which was supported by only the following points and authorities (R. 27):

> POINTS AND AUTHORITIES IN SUPPORT OF FOREGOING MOTION.
>
> There is no allegation of facts which will show or tend to show a conspiracy within the purview of Title 18, Section 51, United States Code.
>
> There is not sufficient allegation to show or tend to show that plaintiff was entitled to be given an examination for a license to practice medicine. Rule 12 (b).

Yet appellant filed the following authorities in oppostion to appellees' motion to dismiss::

> Constitution of the United States of America, Revised and Annotated, 1938, published by the United States Government Printing Office, states at Page 767:

"The amendment does not define the specific privileges and immunities of citizens of the United States; and 'no attempt has been made by the courts comprehensively to define or enumerate the privileges and immunities which the Fourteenth Amendment thus protects.' However, in the Slaughter House Cases the Court suggested 'some which owe their existence to the Federal Government, its National character, its Constitution or its laws,' as follows: Right of access to the seat of Government, and to the seaports, subtreasuries, land offices, and courts of justice in the several States; right to demand protection of the Federal Government on the high seas or abroad; right of assembly and privilege of writ of habeas corpus (specifically guaranteed by the Constitution); right to use the navigable waters of the United States; rights secured by treaty.

Colgate v. Henry, 296 U. S. 404, 429 (1935).

16 Wall. 36, 79 (1873).

"In 1823 Justice Washington in Corfield v. Coryell gave a partial enumeration of the fundamental privileges and immunities of the citizens of all free governments, and hence of the several State of the Union. He listed: 'Protection by the Government—The enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the Government may prescribe for the good of the whole.' This definition was adapted

in substance in Paul v. Virginia, and Ward v. Maryland, and 'the argument is not labored which gives the same meaning to it (the expression "privileges and immunities") when used in the Fourteenth Amendment'."

4 Wash. (U. S.) 371 (1823).

8 Wall. 168, 180 (1869).

12 Wall. 418, 430 (1871).

Maxwell v. Dow, 176 U. S. 581, 591, 592 (1900).

In Colgate v. Harvey, 296 U. S. 430, the United States Supreem Court said:

"The right of a citizen of the United States to engage in business, to transact any lawful business, or to make a lawful loan of money in any State other than that in which the citizen resides is a privilege equally attributable to his National citizenship. A State law prohibiting the exercise of any of these rights in another State would, therefore, be invalid under the Fourteenth Amendment."

* * *

"Constitutional guaranty of citizens of freedom from abridgment of privileges and immunitie as citizens and forbidding taking of property

without due process guarantee, among other things, right to pursue any lawful business."

Ex Parte Martin, 74 S. W. 2d 1037, 75 S. W. 2d 1116.

"State cannot arbitrarily exclude citizens of United States from doing business within State."

Davidson v. Henry L. Dougherty & Co., 241 N. W. 700, 91 A.L.R. 1308.

See also Bruhl v. State, 13 S. W. 2d 93;

City of New Brunswick v. Zimmerman, 79 Fed. 2d 428.

Story on the Constitution, Fifth Edition, Volume 2, Page 697, says as follows:

"Par. 1950. It should be observed of the terms 'life,' 'liberty,' and 'property,' that they are representative terms, and are intended and must be understood to cover every right to which a member of the body politic is entitled under the law. The limbs are equally protected with the life; the right to the pursuit of happiness in any legitimate calling or occupation is as much guaranteed as the right to go at large and move about from place to place. The word 'liberty' here employed implies the opposite of all those things which, beside the depreviation of life and property, were forbidden by the Great Charter. In the charter

as confirmed by Henry III., no freeman was to be seized, or imprisoned, or deprived of his liberties or free customs, or outlawed or banished, or any ways destroyed, except by the law of the land. The rights thus guaranteed are something more than the mere privileges of locomotion; the guarantee is the negation of arbitrary power in every form which results in a deprivation of right. The word we employ to comprehend the whole is not, therefore, a mere shield to personal liberty, but to civil liberty, and to political liberty also so far as it has been conferred and is possessed. It would be absurd, for instance, to say that arbitrary arrests were forbidden, but that the freedom of speech, the freedom or religious worship, the right of self-defense against unlawful violence, the right freely to buy and sell as others may, or the right in the public schools, found no protection here; or that individuals might be selected out and by legislative act arbitrarily deprived of the benefit of exemption laws, pre-emption laws, or even of the elective franchise. The word, on the other hand, embraces all our liberties—personal, civil, and political. None of them are to be taken away, except in accordance with established principles; none can be forfeited, except upon the finding of legal cause, after due inquiry."

In a footnote Justice Story quotes Dr. Lieber as saying:

"We should no more think of defining liberty in our constitutions than people going to be married would stop to agree upon a definition of love." Civ. Lib. and Selt-Govt. It may not be inappropriate here to introduce a definition from Mr. Mill: 'This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our character; of doing as we like, subject to such consequences as may follow, without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual follows the liberty, within the same limits, of combination among individuals; freedom to unite for any purpose not involving harm to others; the persons combining being supposed to be of full age, and not forced or deceived. No

society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest." Mill on Liberty, Introd.

In addition, we cite Bromley v. State, 2 S. E. 2d 641, 651, wherein the court said:

"The right to make a living is among the greatest of human rights, and when lawfully pursued cannot be denied."

III

The defendants have claimed that this complaint does not state a cause of action, and we submit the following authorities in oppostion to such contention:

Simkins Federal Practice, Rules of Civil Procedure 1938, Third Edition, Page 32, Paragraph 21, states: :

"Jurisdiction of the District Court. The jurisdiction of the district court is outlined in Par. 24 of the Judicial Code was amended. This section contains twenty-eight subsections, and includes jurisdiction of suits under many special federal laws. These subsections may be briefly summarized as follows:

" x x x

"23. Suits against trusts, monopolies, and unlawful combinations;"

And Paragraph 22, on Page 35, states:

"Requisites of Jurisdiction as a Federal Court. Thus the original jurisdiction of the District Courts in suits of a civil nature at common law or in equity may be stated as follows:

"First: When the suit arises under the Constitution and laws of the United States, or treaties made, or which shall be made, under their authority, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

" x x x "

* * *

"Par. 113. What Is a Federal Question. The

rule is that when it appears from the complaint, unaided by any anticipation or avoidance of defenses, that the right of relief depends upon the construction or application of the Constitution-tion or laws of the United States, and that such Federal claim is not merely colorable and is substantial, the court has jurisdiction.

"The Federal Question must be substantial in order to confer jurisdiction."

Simkins Federal Practice, Third Edition, Page 157, and Cases Cited.

Mosher v. Phoenix, 287 U. S. 29.

Levering & G. Vo. v. Morrin, 289 U. S. 103.
Malone v. Gardner, 62 Fed. 2d 15.

IV

The Act of the Legislature in giving absolute power to examining boards to pass upon the qualifications, as enacted in the legislation referred to, is in violation of that part of Section 1 of Article III of the Constitution of the United States reading as follows:

"The judicial power of the United States, shall be vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish."

In Marbury v. Madison, 1 Cr. 137, 170, (1803), it is held that where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, the individual has a right to resort to the laws of his Country for a remedy.

See also United States ex rel, Boynton v. Blaine, 139 U. S. 306, 326 (1891);

Ex Parte Cooper, 143 U. S. 472, 503 (1892);
Quackenbush v. United States, 177 U. S. 20, 25 (1900);

Clough v. Curtis, 134 U.S. 361, 372 (1890);

V

Paragraph VIII of the second amended complaint alleges as follows:

> "That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards, rules and requirements, through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American

Medical Association, but that both the American Medical Association and the Association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge."

This cause alone is a sufficient cause of action.

The American Medical Association, of which the appellees, with the exception of Charles C. Bradbury, are members, was convicted for violation of the anti-trust laws in the District Court of the United States in and for the District of Columbia, which conviction was upheld by the United States Supreme Court, Advance Sheet No. 7, Vol. 87, U. S. L. Ed. 348.

The right to sue for damages for violation of the Sherman and Clayton anti-trust acts is fully discussed in Columbia Law Review, Volume 39, Pages 524 to 528. Among the cases cited therein upholding this

right is Majestic Theater Company, Inc. v. United Artists Corporation, 43 F. 2d 991; Paramount Famous Lasky Corporation v. United States, 34 F. 2d 984, Affirmed 282 U. S. 30.

Again, in Columbia Law Review, Volume 40, Page 1100, in discussing these cases it states:

> "If such an agreement is approved, the courts, mindful of the public interests in this industry, have repeatedly held it to be unreasonable and thus within the stricture of the anti-trust laws."

If the courts are mindful of the public interests in the moving picture industry, they should be more so in the American Medical Association and its members. And most assuredly when the American Medical Association, with its 123,000 members, who pay $30 each per year dues, maintain a legislative lobby to enact legislation providing that only graduates of the schools approved by their organization can qualify to take the examination and to be licensed to practice medicine and surgery, it must come within the stricture of the anti-trust laws.

VI

Counsel for appellees will contend that the Fourteenth Amendment to the Constitution does not apply, that this is a prohibition against the State; and that if it does, Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, has the right to appear as counsel for appellees.

This the appellant denies, because the law which the appellees, through the American Medical Association, have obtained, providing that only graduates of the legally chartered schools of medicine, the requirements of which shall have been at the time of granting the diploma not less than those prescribed by the Association of American Medical Colleges, is unconstitutional.

What rights have the Association of American Medical Colleges to say that their method of treating the human ills is the only way? It is a well recognized fact that medicine is not an exact science. In a recent brief before the New Jersey Legislature opposing a similar law it was stated that in Johns-Hopkins Hospital their diagnoses were fifty per cent wrong, that in Bellview Hospital in New York their diagnoses were sixty per cent wrong, and similar facts regarding the greatest hospital institutions of the Country.

We for the last decade in our government have been drifting toward the crisis which we face today, of whether we shall have government by constituted authority or government by organization. The medical and legal professions have in the past been looked up to for guidance through any crisis. For us to seek special legislation in any way providing for governing our professions I fear has been a guide for some of the problems we face of organizations letting our Armed Forces down. Unless stopped by the courts by decreeing that the legislature only can set the standards of the professions, we face disaster. Jus-

tice Ross of the Arizona Supreme Court, in Buehman et al. v. Bechtel et al., supra, has pointed out to the courts the law that can save our Constitution in this issue, as follows:

> "Only the Legislature can creat the standard and provide reasonable limits of the power admitting and excluding persons from a business, trade or profession.'

The Court further said in that case that "Legislation tending to promote monopolies in private business is to be condemned."

At the time this decision was rendered, the North Carolina Supreme Court, in the case of State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366, had upheld a statute licensing photographers, which caused Frank Hanft, Professor of Law, and Gay Nathaniel Hamrick, student, of the University of North Carolina, to write a thesis and brief on licensing of the professions, and Chief Justice Ross of the Supreme Court of Arizona in writing the decision in Buehman et al. v. Bechtel et al., supra, made the following comments in regard to the delegation of power to set the standards of practice to other than the Legislature:

> " 'Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control

the personnel of the business, have become so common as to affect progessively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations occupations ranging from the learned professions to the ordinary trades. U. N. C. Law Review, Vol. 17, p. 1.

" 'No independent administrative supervision is provided over these organizations. No report of their activities is made to any responsible branch of the government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

" 'The stage of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quantum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366.

Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

" 'It is this power of exclusion of fellow workers in the same field that gives to the subject its social significance, and invites our most serious consideration of the constitutional guaranties of personal liberty and individual right called to our attention'."

The North Carolina Law Review in commenting on the Lawrence case, cited above, further states:

"Many of these laws it is suspected are procured by men already in the field, in order to keep others out. We are moving rapidly in the direction of regimenting even the most ordinary callings under official control, when it is doubtful whether the legislators or the public desire such state of affairs. It is doubtful whether even the responsible pressure groups are in favor of a controlled economy, they merely want certain ad-

vantages to be gained for themselves by one particular control statute, but statutes added together make a large-scale trend. There is a lack of uniformity among these miscellaneous control statutes, all of which have the same objective. Licensing legislation has had its trial period; it has demonstrated its value in those professions where special competence is essential to such vital public interests as health; it is time either to accept it as good policy for ordinary occupations, also, or to reject it as such policy. If accepted, it is time to frame a standard licensing law, to be deviated from in the case of any particular occupation only when there is reason for the deviation."

CONCLUSION

Appellant respectfully submits that he is entitled to have an examination for a license to practice medicine; that the appellees have denied him his right and have conspired in violation of Section 2, Title 15, of the Laws of the United States and Section 1 of the Fourteenth Amendment to the Constitution of the United States in denying him his rights and causing him damages; that appellant is entitled to judgment on the original complaint filed herein and the motion for default against appellees (R. (19).

If not entitled to judgment, appellant has certainly stated a cause of action in the second amended

complaint alleging damages for violation of the anti-trust laws, and is entitled to have the right to prove the facts set up in the second amended complaint filed herein.

Respectfully submitted,

C. H. RICHESON,
Attorney for Appellant.
1147 N. 24th St.
Telephone 3-3476
Phoenix, Arizona

No. 10443

United States
Circuit Court of Appeals
For the Ninth Circuit

W. S. SWANK,

Appellant,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY and WILLIAM G. SCHULTZ,

Appellees.

APPELLEES' BRIEF

T. E. SCARBOROUGH,
Ellis Building, Phoenix, Arizona
Attorney for Appellees

No. 10443

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Appellees.

APPELLEES' BRIEF

PREAMBLE

While it is the opinion of the appellees in this case that the appellant has not complied with Sections 2 and 3 of Rule 20 of the Rules of Practice of this Court in the preparation and filing of his brief, the appellees will not make an issue of that fact, since we are aware that the Court is far more familiar with its own rules of practice than counsel, who have only a limited knowledge of those rules.

It will be noted that Mr. C. A. Edwards, who was formerly connected with this case, comes in for a great deal of comment in appellant's brief, and in tribute to Mr. Edwards the appellees desire to make it known to the Court that Mr. Edwards is now a member of the armed forces of the United States Government and is no longer longer an attorney in this case.

APPELLEES' STATEMENT

Appellees feel that the appellant has not given a clear statement of the subject matter in his brief, and we are therefore making the following brief statement or outline of what has transpired.

Appellant, plaintiff below, filed his original complaint in the District Court of the United States, for the District of Arizona, against the appellees, asking for damage and other relief, alleging, among other things:

IV.

> "That the defendants, E. J. Gotthelf, Charles C. Bradbury, Charles S. Smith and William G. Schultz, are the members of the Board of Medical Examiners, operating under the Basic Science Laws of 1935.
>
> "That J. H. Patterson has, at all times, been the acting Secretary of the said Board of Medical Examiners."

V.

"That the defendants and each of them have, for a long period of time, since 1933, repeatedly refused to give the plaintiff an examination for a license to practice medicine, though often requested." (Transcript of Record, p. 13-14).

The prayer of appellant's original complaint was:

"Wherefore, plaintiff prays judgment against the defendants and each of them in the amount of Fifty Thousand ($50,000.00) Dollars, and for such other relief as the Court may deem just and proper." (Transcript of Record, p. 17).

On March 20, 1943, this original complaint was abandoned by the plaintiff in favor of his second amended complaint. (Transcript of Record, p. 30).

Before all of the defendants, appellees herein, were served with summons and before any amendments were filed, Mr. C. A. Edwards appeared before the Court on January 25, 1943, and obtained an order of the Court extending for twenty days from that date the time of all of the defendants to answer. (Transcript of Record, p. 17) Thereafter, and on February 2, 1943, the appellant filed what he termed "corrected application to set order aside, extending time to answer, and motion for default". (Transcript of Record, p. 22) On February 8, 1943, the Honorable Dave W. Ling, the United States District Judge, entered an order denying plaintiff's corrected applica-

tion to set aside order extending time to answer. (Transcript of Record, p. 26) On the same day, the appellees, defendants below, filed their motion to dismiss plaintiff's complaint, the grounds for the motion being that the Court had no jurisdiction over the subject matter of the action, and that the complaint does not state a claim upon which relief can be granted. This motion was signed by T. E. Scarborough and C. A. Edwards for all of the defendants other than William G. Schultz. (Transcript of Record, p. 26) On February 10th, the appellant filed an application for an order removing C. A. Edwards, Assistant Attorney General, as counsel for the defendants. (Transcript of Record, p. 28)

Appellees find no record of any action having been taken by the Court on such application. The motion to dismiss plaintiff's complaint was granted, and the Court entered an order dismissing the case, for the reason that the (second amended) complaint did not state a cause of action, (Transcript of Record, p. 28) from which order the appellant filed notice of appeal on the 30th day of April, 1943. (Transcript of Record, p. 49).

ARGUMENT

The questions for the determination of this Court, as the appellees view them, are:

FIRST: Is this appeal premature?

SECOND: Was the appellant ever entitled to default?

THIRD: Does the second amended complaint present any question upon which the Federal Court has jurisdiction?

FOURTH: Does the second amended complaint set forth any grounds upon which relief could be granted?

We will take up the above questions in their order.

I.

THE APPEAL IS PREMATURE.

The plaintiff did not await a final judgment, nor did he make known that he did not seek to file other amendments before he gave notice of appeal. Defendants had no opportunity to have final judgment entered for their costs.

For the above reasons, none of the orders entered were final judgments from which an appeal may be taken.

Phoenix v. Jones, 21 Ariz. 432;

189 Pac. 242.

Rice v. Hansen, 27 Ariz. 529;

234 Pac. 563.

Cardiff v. Winslow, 32 Ariz. 442;

259 Pac. 881.

The Federal courts follow the practice prevailing in the State courts.

Wheeler v. Harris, 13 Wall 51;

20 L. Ed. 531.

II.

PLAINTIFF'S NOT ENTITLED TO DEFAULT

(a) Plaintiff's Original Action Was Against State Board.

Before all of the defendants were served with summons in this action, Mr. Edwards, as Assistant Attorney General, appeared before the Court and obtained additional time within which to answer. This was done in his capacity as Assistant Attorney General. Since it is the duty of the Attorney General of the State of Arizona to defend all official boards and agencies of the State, there is no doubt but that the Attorney General had authority to appear and defend

against the original complaint. The Arizona Code provides:

> "4-503. Legal advisor of departments. The attorney-general shall be the legal advisor of all departments of the state, and shall give such legal service as such departments may require. With the exception of the industrial commission, no official, board, commission, or other agency of the state, other than the attorney-general, shall employ any attorney or make any expenditure or incur any indebtedness for legal services. The attorney-general may, when the business of the state requires, employ assistants. (R. C. 1928, PP 52a as added by Laws 1931, ch. 30, PP 1, p. 52)". (4-503, Arizona Code Anno. 1939).

It cannot be determined from the original complaint filed herein whether the defendants were being sued as individuals or as a State board. Certainly, from paragraphs IV and V of the original complaint alleging the defendants to be members of the Board of Medical Examiners and operating under the Basic Science Laws of 1935 and that the defendant, J. H. Patterson, was the acting Secretary of said Board of Examiners, and that the defendants had repeatedly refused to give the plaintiff an examination for a license to practice medicine, followed with a prayer for $50,000 damage and *for such other relief as the Court may deem just and proper*, it would certainly seem that the plaintiff was seeking to have some judgment of the Court rendered against the defendants

in their official capacity as a board, or agency of the state. It was not until the second amended complaint was filed that the plaintiff, appellant herein, made it definitely clear that he was suing defendants individually and not as members of the Board of Medical Examiners.

Since the second amended complaint was filed, neither Mr. Edwards nor any member of the Attorney General's Office has taken any active part in the defense of this action.

(b) Plaintiff's Abandonment of Original Complaint Precludes Any Objection Being Raised to Rulings Affecting It.

The second amended complaint supersedes all previous complaints, and the filing of the same was an abandonment of plaintiff's original pleadings, and the original pleadings filed herein are no longer part of the record. By the filing of the second amended complaint, the plaintiff thereby elected to stand or fall on the allegations of the second amended complaint, and all subsequent proceedings in this case must relate to the second amended complaint. The appellant now cannot be heard to complain of any action of the Court affecting the original complaint.

Bedell v. Baltimore etc. Railroad Co.,
245 Fed. 788.

Lasky v. New Town Mining Co.,
56 Fed. 628.

U. S. v. Gentry
119 Fed. 70.

Shafer v. Acklin
205 Iowa 567
218 N. W. 286

Jennings v. Fayne
226 Ky. 290
10 S. W. (2d) 1101.

McLain Bank v. Pascagoula Natl. Bank
150 Miss. 738
117 SO. 124.

Arkla Lumber Co. v. Henry Quellmalz

Lumber Co., 252 S. W. 961

Scott v. Price
123 Okla. 172
247 Pac. 103.

Atherton v. Clearview Coal Co.,
267 Pac. 425.

Love v. Virginia Power Co.
86 W. Va. 393
103 S. E. 352.

Montana Natl. Bank v. Bingham
83 Mont. 21
269 Pac. 162.

Ryan v. Old Veterans Mining Co.,
35 Idaho 637
207 Pac. 1076.

III.

THE COURT HAS NO JURISDICTION OVER THE SUBJECT MATTER OF THIS ACTION

(a) The 14th Amendment Does Not Give the Federal Courts Jurisdiction of This Action.

The appellant says that his rights have been violated and relies on the Fourteenth Amendment of the Federal Constitution to give the Court jurisdiction over the subject matter of this action. This case appears to be one of those cases often referred to as "those last resorts of desperate cases."

Plaintiff complains that he "has been denied the benefits and rights granted him under and by the provisions of the Fourteenth Amendment to the Constitution of the United States", (Par. VII, Second Amended Complaint, p. 43, Transcript of Record) and then proceeds to quote the Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

It has been universally held that the Fourteenth Amendment adds nothing to the rights of one citizen as against another. It simply furnishes a guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen.

U. S. v. Cruikshank
92 U. S. 542, 23 L. Ed. 588.

Louisville v. Cumberland Tel. etc. Co.
155 Fed. 725.

U. S. v. Powell
151 Fed. 648 (affirmed 212 U. S. 564).

U. S. v Moore.
129 Fed. 630.

To quote from United States v. Cruikshank, supra: "The Fourteenth Amendment prohibits a state from depriving any person of life, liberty or property without due process of law, but adds nothing to the rights of one citizen against another". It is apparent from the foregoing authorities that if the appellant has been damaged, his action should be against the State of Arizona or some duly constituted board or commission of the State. He is seeking here in a backhanded way to attack the constitutionality of a law passed by the Legislature of the State of Arizona without any allegation or other showing that the defendants, or any of them, have any interest in the enforcement of the law or that they are in any way charged with the duty of enforcing it. The method adopted by the appellant amounts to a collateral attack on the constitutionality of a statute. It is well settled that the

constitutionality of a statute will not be determined on the question being raised in a collateral proceeding.

U. S. v. Delaware etc. Co.,
213 U. S. 366
53 L. Ed. 836 (reversing 164 Fed. 215).

Wright v. Kelly
4 Idaho 624, 43 Pac. 565.

Wadhams v. San Francisco Co.,
80 Ore. 64, 156 Pac. 425.

The plaintiff is apparently attempting to ride two horses at one time. In one breath he says that the defendants "because of envy, bias and prejudice toward him and in fear of his competition and qualifications in the method and practice of the healing arts, . . . have refused to issue him a license to practice medicine and surgery in the State of Arizona". (Second Amended Complaint, Par. VI, p. 43, Transcript of Record) Next, he says the Basic Science Law of Arizona, which prescribes the qualifications of one seeking to have a license to practice medicine issued him is unconstitutional.

If the Basic Science Law of Arizona is what is preventing the plaintiff from practicing medicine, then his action, if any he has, should be against the State of Arizona, or any board charged with the duty of enforcing the law.

The gist of plaintiff's action is set forth in Paragraph VI, second amended complaint:

VI.

"That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well knowing that plaintiff was and is in every respect qualified to have issued to him a license to practice medicine and surgery in Arizona, and for other personal reasons best known to each of them, and because of envy, bias and prejudice toward him, and in fear of his competition and qualifications in the methods and practice of the healing arts, have refused to accept his credentials and to issue him a license to practice medicine and surgery in Arizona, and have also refused to give him an examination; all with knowledge that their acts and conduct herein complained of are wrongful, unlawful and unconstitutional." (Transcript of Record, p. 43).

It is one of the inherent rights of the plaintiff and every other person to go upon the streets of a certain village or city in the peaceful pursuit of his daily routine of life, but if one or all of the defendants, or

any other individual, should prevent him from so doing, even if actual force is used, the Fourteenth Amendment would afford him no relief, and he would have to look elsewhere than the Federal courts for redress.

(b) The Federal Courts Do Not Acquire Jurisdiction of This Case Under the Anti-trust Act.

There is no allegation in the second amended complaint that the plaintiff is now, or intends to be engaged in interstate commerce.

Title 15, Laws of the United States, is what is commonly known as the Sherman Anti-Trust Act:

> "1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by punishment by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.
>
> "2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be

deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"3. Every contract, combination in form of trust or otherwise, or conspiracy, in trust or otherwise, or conspiracy, in restrain of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any States or State or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is

found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. Act of Congress, July 2, 1890 (26 U. S. St. at L. 209 c 647) Comp. St. 8820 et. seq."

No where in the 2nd Amended Complaint does it appear that the acts complained of are in restraint of trade in interstate commerce. Without such an allegation the plaintiff has no action.

U. S. v. Paramount Famous Lasky Corporation, 34 Fed. (2) 984; 282 U. S. 30. (Cited in App. Brief).

Majestic Theatres Co. v. United Artists Corp. 43 Fed. (2) 991. (Cited in App. Brief).

In order to constitute a violation of the Sherman Anti-Trust Act, the acts complained of must affect and operate directly upon commerce among the states of the United States or with foreign nations.

Industrial Association of San Francisco, v. U. S., 268 U. S. 64, 69 L. Ed. 849.

Addyston Pipe etc. Co. v. U. S., 175 U. S. 211; 44 L. Ed. 136.

Hopkins v. U. S., 171 U. S. 578, 43 L. Ed. 290.

U. S. v. Trans-Missouri Freight Ass'n. 166 U. S. 290, 41 L. Ed. 1007.

In order to bring a case within the Anti-Trust Act, it must appear that the combination or conspiracy complained of interferes with and restrains the free and natural flow of trade in interstate commerce.

Eastern States Retail Lumber Deals Assoc. v. U. S.
234 U. S. 600; 58 L. Ed. 1490.

U. S. v. Union Pac. R. Co.
226 U. S. 61; 57 L. Ed. 124.

The act does not authorize exemplary damages, as prayed for. Sec. 7 of the act, supra.

Neither the Sherman Act or the Clayton Act has any application to intra-state comerce.

Quincy Oil v. Sylvester
228 Mass. 95; 130 N. E. 217.

IV.

THE COMPLAINT DOES NOT SET FORTH ANY GROUND UPON WHICH RELIEF CAN BE GRANTED

(a) No Duty Alleged On Part of Defendants.

The plaintiff seeks to recover damages from the defendants because of their refusal to issue him a li-

cense to practice medicine and surgery in the State of Arizona.

Nowhere in the second amended complaint is there an allegation that the defendants, nor any or either of them, have any right, duty, power or authority to issue to the plaintiff or any other person a license to practice medicine or surgery.

A failure to make such an allegation is fatal.

> Menefee Lumber Co. v. MacDonald et al. 122 Or. 579; 260 Pac. 444.
>
> Bermingham v. Cheetham, 19 Wash. 657; 54 Pac. 37.
>
> Hollenbeck v. Winnebago County, 95 Ill. 148; 35 AmR151.

(b) Practice of Medicine Regulated by Statute.

The second amended complaint shows on its face that the practice of medicine and surgery in Arizona is fully regulated by law, setting up a Board of Medical Examiners (Paragraphs II and III, Second Amended Complaint, Transcript of Record, p. 31 to 41) clothed with all the powers and duties existing and necessary to pass upon plaintiff's application for license to practice medicine and surgery in Arizona.

We submit that the action of the District Court in

ordering the case dismissed should be affirmed, and such penalty assessed for frivolous appeal as the facts and law may warrant.

Respectfully submitted,

T. E. SCARBOROUGH
Ellis Building, Phoenix, Arizona,
Attorney for Appellees,

J. H. Patterson, E. J. Gotthelf, Charles S. Smith, and Charles C. Bradbury.

No. 10443

United States
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Appellees.

Upon Appeal from the District Court of the United States for the District of Arizona

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APPELLANT'S REPLY TO APPELLEES' BRIEF

C. H. RICHESON
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Attorney for Appellant.

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APPELLANT'S REPLY TO APPELLEES' BRIEF

BRIEF OF ARGUMENT

Appellees' four arguments, namely,

FIRST: Is this appeal premature?
SECOND: Was the appellant ever entitled to default?

THIRD: Does the second amended complaint present any question upon which the Federal Court has jurisdiction?

FOURTH: Does the second amended complaint set forth any grounds upon which relief could be granted? will be discussed in this reply in the sequence mentioned.

Appellant is convinced that the position taken by the appellees in their brief is erroneous and is not an answer to the charges made in appellant's Record and Brief made in the court below.

ARGUMENT

I

The appellees further state that the Federal Courts follows the practice prevailing in the State courts, and object that they had no chance to file a bill for costs.

Beginning with the last argument, that appellees had no chance to file a cost bill, there is nothing in the record to show, and in fact there was no attempt on the part of appellees to file a cost bill, and certainly appellees cannot charge appellant with the duty to protect appellees' interest in any way in this litigation.

As to not filing a final judgment in this case, the question of what is a final judgment or decree depends on its essence and not its form or what it is called, and the Supreme Court has been liberal and not technical in construing the words "final judgment" or "decree." To be final the controversy must be settled and the case must be left in such a condition that if there be an

affirmative by the appellate court, the court below will have nothing to do but execute the judgment. *The question must be determined by Federal and not State law.* It is also settled that the face of the judgment or decree is the test of its finality.

Simkins Federal Practice, Third
Edition, PP. 608-609, Par. 847.

It is certain that the order dismissing this cause because the complaint does not state a cause of action is final, as there is nothing left, if affirmed by the court of appeals, to do but to execute the order of the court below.

Hoharst v. Hamburg-American Packet Co.,
148 U. S. 265;

French v. Shoemaker, 12 Wall 98,
20 L. Ed. 271;

West v. East Coast Cedar Co.,
113 F. 743;

National Bank v. Smith,
156 U. S. 333;

Megher v. Minnesota Thresher Mfg. Co.,
145 U. S. 611.

A judgment is a sentence of the law pronounced by the court upon the matter contained in the record. 3 Blackstone Commentaries 395.

As to the Federal courts being bound to follow the

practice prevailing in the State courts, the Federal courts are no longer governed by the State practice in the matters of pleadings, but by the Federal Rules of Procedure in the District courts.

Schenley Distillers Corporation v.
Renkin, 34 F. Supp. 687.

It was held that an order dismissing for want of jurisdiction was an order from which an appeal could be taken in Mosher v. City of Phoenix, 287 U. S. 67.

II

Appellees contend appellant is not entitled to default, for the following reason: First, that appellant's original complaint was against the State Board, and quote Section 4-503 of the 1939 Laws of Arizona as authority for Cecil A. Edwards, an Assistant Attorney General, to appear and obtain a continuance from the United States District Court for time to answer. Yet after quoting this statute appellees state: "It cannot be determined from the original complaint filed herein whether the defendants were being sued as individuals or as a State board." It is clear from the relief asked for the appellant was asking for damages caused by appellees individually, and each of them, and not as a board. Paragraph VII of the original complaint settles the question as to whether the appellant was suing appellees as a board or as individuals. Paragraph VII read as follows:

"Plaintiff alleges that, in addition to denying this plaintiff the right to take the examination as a doctor of medicine, defendants and each of them have caused the plaintiff to be arrested and tried in the courts of Maricopa County, Arizona, on a felony charge of practicing medicine without a license, although plaintiff was only treating patients as a naturopathic physician and has a license to practice the art of healing as a Naturopath under the laws of the state of Arizona.

"Plaintiff alleges that he was acquitted of said charge of practicing medicine without a license, in the courts of Maricopa County, Arizona; that the defendants, and each of them, have caused numerous damage suits to be filed in the courts of Maricopa County, for malpractice, which suits have been decided in favor of the plaintiff." R. 14-15.

Further, this claim by appellees is refuted by the fact that Senate Bill 61 was introduced in the Sixteenth Legislature of the State of Arizona, which would permit the Attorney General and his assistants to appear for appellees when sued for damages. See Page 38 Appellant's Brief; after this suit was filed.

Section 4-502 of the Laws of Arizona 1939 provides as follows:

"Duties.—The attorney-general shall:

"1. Devote his entire time to the discharge of the duties of his office and not engaged directly or indirectly in the private practice of law;"

This question was definitely decided by the Supreme Court of the State of Arizona in Conway v. State Consolidated Publishing Co., 112 P. 2d 218. This case definitely decided that the Attorney General nor his deputies had not the right to engage in the private practice of law. The United States courts follow the construction of State laws by the Supreme Court of that State.

Shaver v. Nash, 29 S. W. 2d 298, 73 A. L. R. 961;

Erie R. R. Co. v. J. H. Thayer Martin, State Tax Commissioner of the State of New Jersey, et al, 61 U. S. 945; 313 U. S. 569, 115 F. 2d 968, 30 F. Supp. 41.

It will be noted that appellees in the preamble to their brief state: "It will be noted that Mr. C. A. Edwards, who was formerly connected with this case, comes in for a great deal of comment in appellant's brief, and in tribute to Mr. Edwards the appellees desire to make it known to the Court that Mr. Edwards is now a member of the armed forces of the United States Government and is no longer an attorney in this case."

Appellant wishes to call to the attention of the Court the fact that a copy of appellant's brief was served on the Attorney General of the State of Arizona, the Hon. Thomas J. Croaff, who succeeded Cecil A. Edwards, receipting for same; that neither Mr. Croaff nor the Attorney General, Mr. Joe Conway, is entered here as

joining in paying tribute to Mr. Edwards. In fact appellant is well informed that after receiving appellant's brief, the Attorney General notified the appellees that he was of the opinion that they never belonged in this case as counsel for appellees, which is supported by the fact of his absence. Therefore the fact that Mr. Edwards was drafted into the armed forces of the United States does not in any way mitigate the unlawful and wrongful appearance by him, at State expense, for appellees in the court below to obtain a continuance of time in which to answer.

Appellees further contend that appellant has no right to default because by filing the second amended complaint the right under the original complaint was abandoned. This doctrine applies only to an amended complaint which creates a new cause of action.

Union Pacific R. R. Co. v. Otto Wyler,
158 U. S. 285.

It is fiction of law to claim abandonment of a cause of action when it will operate to cut off a substantial right when amended pleading does not allege a new cause of action.

Black Mountain Corporation v. Webb,
14 S. W. 2d 1063.

This doctrine of law is supported by the cases cited by appellees. In the case of United States v. Gentry, 119 F. 70, the court said: "An amended complaint which is complete in itself and which does not refer to

or adopt the original complaint as a part of its entirely supersedes its predecessor and becomes the plaintiff's sole cause of action." In Shafer v. Ackling, 218 N. W. 286, again, the court said: "The defendant abandoned lack of consideration for guarantee agreement on note and absence of guarantee agreement by amending answer and interposing plea of release." In Jennings v. Fayne, 10 S. W. 2d 1101, the court said: "Plaintiff abandoned cause of action for breach of warranty as to acreage conveyed by filing amended petition alleging fraud and deceit." The same condition exists in McLain Bank v. Pascagoula National Bank, 117 So. 124. It is a fiction of law to assume that where the amended complaint dose not forsake the action in the original complaint, that the amended complaint abandons any right under the original complaint. However, the fact that Cecil A. Edwards unlawfully and wrongfully appeared as counsel for appellees and obtained an extension of time to answer gives appellees no right to the claim of abandonment to protect themselves against this unlawful and wrongful act in relying upon a public servant who might by any method be persuaded at public expense to defend them against their alleged wrongful acts which were complained of in the original and the second amended complaint. In both complaints, the original and second amended, the appellees are charged with violation of the anti-trust laws of the United States, causing appellant great injury, and appellant submits that Cecil A. Edwards before appearing and asking for a continuance of time to answer for appellees was advised by counsel for appellant that the Attorney

General nor his deputies had no lawful right at public expense to defend appellees and in fact expressed the opinion that if he as Assistant Attorney General belonged in the case, it was to help prosecute appellees for violation of the anti-trust laws, which had caused appellant's damage.

Wherefore, appellant insists that we are entitled to judgment on the pleadings by default because of the wrongful and unlawful appearance of Cecil A. Edwards, Assistant Attorney General of the State of Arizona.

III

Appellees claim that the Fourteenth Amendment to the Constitution does not give the Federal courts jurisdiction of this action. Appellees state, Page 11 of their Brief: "It has been universally held that the Fourteenth Amendment adds nothing to the rights of one citizen as against another. It simply furnishes a guarantee against any encroachment by the State upon the fundamental rights which belong to every citizen." Appellees easily forget that in appellant's second amended complaint, Paragraph VIII, we alleged as follows:

> "That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards,

rules and requirements through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American Medical Association, but that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge." R. 44-45.

The appellees are charged with obtaining the legislation under which they attempt to act in depriving appellant of his rights, which brings them within the purview of the Fourteenth Amendment to the Constitution. In addition they are charged with violating the anti-trust laws of the United States.

The third and fourth questions raised by appellees, asking whether the second amended complaint presents any question upon which the Federal Court has jurisdiction, as does the second amended complaint set forth any grounds upon which relief could be granted can be answered together. Even if the Fourteenth Amendment to the Constitution had not been set up in the original and second amended complaints, it is clear that in both complaints there is an allegation of violation of the anti-trust laws, by which appellant's rights have been denied and which has caused appellant great injury.

Simkins Federal Practice, 1939, Third Edition, Page 32, Paragraph 21, states:

> "Jurisdiction of the District Court. The jurisdiction of the district court is outlined in Par. 24 of the Judicial Code as amended. This section contains twenty-eight subsections, and includes jurisdiction of suits under many special federal laws. These subsections may be briefly summarized as follows:
>
> " x x x
>
> "23. Suits against trusts, monopolies, and unlawful combinations;"

And Paragraph 22, Page 35:

> "Requisites of Jurisdiction as a Federal Court. Thus the original jurisdiction of the District

Courts in suits of a civil nature at common law or in equity may be stated as follows:

"First. When the suit arises under the Constitution and laws of the United States, x x x "

See Brief for the Appellant, 51-53.

In the case of Mosher v. City of Phoenix, 287 U. S. 67, Chief Justice Hughes said: "There is no diversity of citizenship and jurisdiction depends upon the presentation by the bill of complaint of a substantial Federal question. Jurisdiction is to be determined by the allegations of the bill and not by the way the facts turn out or by a decision of the merits." This is supported in Pacific Eelectric Railway Company v. Los Angeles, 194 U. S. 112; Columbus R. R. Power & Light Co. v. Columbus, Ohio, 249 U. S. 39, 6 A. L. R. 1648.

When appellees in their argument, Page 11, state, "He is seeking here in a backhanded way to attack the constitutionality of a law passed by the Legislature of the State of Arizona without any allegation or other showing that the defendants, or any of them, have any interest in the enforcement of the law or that they are in any way charged with the duty of enforcing it," again we cite the Court to Paragraph VIII of the second amended complaint, wherein we charge the appellees, through their legislative committees, with being sponsors of the law, in violation of the Anti-trust Act, and in the brief openly contend these laws are unconstitutional. Appellant's original brief, 52-55.

Appellees state, Page 16 of their brief: "No where in the 2nd Amended Complaint does it appear that the

acts complained of are in restraint of trade in interstate commerce. Without such an allegation the plaintiff has no action." The eight paragraph of the second amended complaint states in part as follows:

> " x x x that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged **in interstate traffic and monopoly** in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona, in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and indicidually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to heir knowledge." R. 44-45.

Therefore we respectfully submited to the Court that the second amended complaint charges the appellees with engaging in interstate commerce in violating the anti-trust laws of the United States.

Respectfully submitted,

C. H. RICHESON
Phoenix, Arizona
Attorney for Appellant.

Submitted to Wilbur, Mathews and Stephens.

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No. 10,443

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. S. SWANK,

Appellant,

vs.

J. H. PATTERSON, E. J. GOTTHELF, CHARLES S. SMITH, CHARLES C. BRADBURY, WILLIAM G. SCHULTZ,

Appellees.

APPELLANT'S PETITION FOR A REHEARING.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S PETITION FOR A REHEARING.

To the Ninth Circuit Court of Appeals and to the Honorable Curtis D. Wilbur, Clifton Mathews, and Albert Lee Stephens, Judges thereof:

Comes now W. S. Swank, the Appellant in the above entitled cause, and presents this his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

I.

That this court has jurisdiction of this case because in the Opening Brief, the second question was:

> "Whether the American Medical Association and its subsidiaries can set the standard of qualifications for the practice of medicine",

which involved the Constitutionality of the Laws of the State of Arizona regarding the Practice of Medicine, Arizona Code Annotated 67-1101 to 67-1109.

II.

That Appellant in the second amended complaint filed herein alleged as follows:

"IV.

That said laws of 1936, in substance, provide that anyone, to qualify for examination to practice medicine and surgery, 'shall file with the board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character and a diploma issued by some legally charted school of medicine, the requirements of which shall have been, at the time of granting such diploma not less than those prescribed by the Association of American Medical Colleges for the year.' In this regard, plaintiff avers that the Association of American Medical Colleges is not a legal or proper authority to prescribe the qualifications for the medical profession or for the practitioners of medicine and surgery, and, therefore, such requirements and prescribed qualifications are unconstitutional and void as a delegation of legislative power; that the law makers of Arizona alone may prescribe the qualifications for the practice of medicine and surgery within the State of Arizona.

That the requirements for and during the year 1927, by the aforementioned American Academy of Medicine and Surgery, were equal to or not less than those of the Association of American Medical Colleges for and during that year, to the

actual knowledge of the defendants and each of them individually.

V.

That the Association of American Medical Colleges is sponsored by the American Medical Association, of which the defendants are members, except the defendant, Charles C. Bradbury; that the defendnats by reason of their said membership and its rules and prescriptions by its legislative committee did, and do, in fact prescribe the qualifications for applicants for license to practice medicine and surgery in the State of Arizona, contrary (39) to law, arbitrarily, unlawfully and discriminatory to qualified applicants, including the plaintiff.

That both the American Medical Association and the Association of American Medical Colleges are monopolistic and act in violation of Section 2, Title 15 of the Laws of the United States, and in violation of Section 74-101 of the laws of the State of Arizona; both of which said provisions of law prohibit trusts and monopolies.

VI.

That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well know-

sand Dollars ($50,000.00) and exemplary damages in the sum of Fifty Thousand Dollars ($50,000.00)."

III.

That appellant in the Opening Brief, pages 37 to 40 states as follows:

"Plaintiff further alleges that the Association of American Medical Colleges is fostered by the American Medical Association; that both the American Medical Association and the American Association of Medical Colleges are monopolistic and act according, in violation of Sec. 2. Title 15 of the United States Code Annotated and in violation of Sec. 74-101 of the Laws of the State of Arizona; that both of said sections prohibit monopolies and said provisions providing that the Association of American Medical Colleges shall make and require such qualifications for the practice of Medicine are contrary to the Constitution and laws of the United States and the Constitution and laws of the State of Arizona.

While the Supreme Court of the State of Arizona has not passed on the constitutionality of the present Basic Science Law, in Bueham et al. v. Bechtel, 114 Pac. 2d 227, they have stated as follows:

(1) Only the legislature can create the standard and provide the reasonable limits of the poser of admitting and excluding persons from a business, trade or profession, State v. Harris, supra. It may be granted that the legislature has fixed the standard as competency, ability and integrity and that such standard is a sufficient and a proper one for a person desir-

ing to practice photography, yet it is apparent the legislature used language the board might construe as giving it the right to disregard such standard and set up an arbitrary standard of its own. The board might regard too much or too strong competition as "sufficient reason" for not licensing a person, or the applicant's age, sex, color or religion might disqualify him. We cannot say the standard fixed by the legislature is not a sufficient guide to the Board of Examiners, or that the Board would arbitrarily disregard such standard and refuse a license to one who qualified under the act, but we do call attention to the fact that the Board may use its power to make it very difficult for worthy persons to secure a license to practice photography.

In connection with the free use of the police power over certain trades and occupations, for the purpose of securing to those engaged therein rights and powers of an exclusive and monopolistic character.

Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personnel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that character may be listed which not only regulate but organize into autonomous corporations, occupations ranging from the learned professions to the ordinary trades, U. N. C. Law Review, Vol. p. 1.

'No independent administration supervision is provided over these organizations. No report of their activities is made to any responsible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

The Stage of internal protest has been reached. In marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quatum of public purpose to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to a private group to be used in narrowing the field of competition, or in aid of exploitation by creating remunerative positions in administration. Roach v. Durham, 204 N. C. 587, 169 S. E. 149; State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366. Without the aid of the statute these groups would be mere trade guilds, or voluntary business associations; with it they become State agencies, retaining, however, as far as possible, distinctive guild features. An exclusive self-governing status is achieved by the device of securing a majority membership on the administrative boards or commissions, and in aid of this the power of the State is heavily invoked by way of prosecution in the criminal courts of those who are unable to secure the approval of the Board and obtain license to engage in the occupation.

It is this power of exclusion of fellow workers in the same field that gives to the subject its

social significance and invites our most serious consideration of the constitutional guarantees of personal liberty and individual right called to our attention.'

Therefore, the appellees in committing the acts complained of were not acting as constituted officials of the State, which appellant contends, prohibits the Attorney General from representing the appellees in this action."

Again beginning on page 55 to 60 in the Opening Brief we state as follows:

"Council for appellees will contend that the Fourteenth Amendment to the Constitution does not apply, that this is a prohibition against the State; and that if it does, Cecil A. Edwards, as Assistant Attorney General of the State of Arizona, has the right to appear as counsel for appellees.

This the appellant denies, because the law which the appellees, through the American Medical Association, have obtained, providing that only graduates of the legally chartered schools of medicine, the requirements of which shall have been at the time of granting the diploma not less than those prescribed by the Association of American Medical Colleges, is unconstitutional.

What rights have the Association of American Medical Colleges to say that their method of treating the human ills is the only way? It is a well recognized fact that medicine is not an exact science. In a recent Brief before the New Jersey Legislature opposing a similar law it was stated that in Johns-Hopkins Hospital their diagnoses were fifty per cent wrong, that in Bellview Hos-

pital in New York their diagnoses were sixty per cent wrong, and similar facts regarding the greatest hospital institutions of the country.

We for the last decade in our government have been drifting toward the crisis which we face today, of whether we shall have government by constituted authority or government by organization. The medical and legal professions have in the past been looked up to for guidance through any crisis. For us to seek special legislation in any way providing for governing problems we face of organizations letting our Armed Forces down. Unless stopped by the courts by decreeing that the legislature only can set the standards of the professions, we face disaster. Justice Ross of the Arizona Supreme Court, in Bueham et al. v. Bechtel et al, supra, has painted out to the courts the law that can save our constitution in this issue as follows:

'Only the legislature can create the standard and provide reasonable limits of the power admitting and excluding persons from a business, trade or profession.'

The Court further said in that 'Legislature tending to promote monopolies in private business is to be condemned.'

At the time this decision was rendered, the North Carolina Supreme Court, in the case of State v. Lawrence, 213 N. C. 674, 197 S. E. 586, 116 A. L. R. 1366, had upheld a statute licensing photographers, which caused Frank Hanfit, Professor of Law, and Gay Nathaniel Hamrick, student, of the University of North Carolina, to write a thesis and brief on licensing of the professions, and Chief Justice Ross, of the Supreme

Court of Arizona in writing the decision in Buehman et al, v. Bechtel et al, supra, made the following comments in regard to the delegation of power to set the standards of practice to other than the legislature;

'Statutes regulating trades and occupations by the delegation of governmental power to boards and commissions formed largely of the groups affected, intended primarily to control the personel of the business, have become so common as to affect progressively and importantly the social and economic life of the State. A large number of laws of that Charter may be listed which not only regulate but organize into autonomous corporations, occupations ranging from the learned professions to the ordinary trades. U.N.C. Law Review, Vol. 17, p. 1.

No independant administrative is provided over these organizations. No report of their activities is made to any resposible branch of government. No audit is made by the State, except where items may incidentally affect the State Treasury. These matters are left to internal control. The organizations are, so to speak, legislatively launched and put on their own.

The stage of internal protest has been reached, in marginal cases controversies in the courts have arisen as to whether the organization has captured a sufficient quatum of public purpose, to operate as an agency of the government, or whether the police power of the State, ostensibly exercised for a public purpose, is not really farmed out to private groups to be used in narrowing the field of competition, or in aid of exploitation by creating renumerative positions in

CERTIFICATE OF COUNSEL.

I, C. H. Richeson, counsel for the above named appellant, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

Dated, Phoenix, Arizona,
December 8, 1943.

C. H. RICHESON,
Attorney for Appellant and Petitioner.